Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JOEL CUNIGAN, MARK WILES, ASST. CHIEF WAYNE GRANT, SAM MANLEY, JOHN TELEK,

Petitioners,

v.

ALI SHAMAEIZADEH, M.D.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals erred in applying the particularity requirements of a warrant to a search based upon consent, thereby, creating a *per se* test requiring express consent, and ignoring the appropriate Fourth Amendment test, the "totality of the circumstances," which encompasses the well-established doctrines of continuing and implied consent.

2. Whether the Sixth Circuit Court of Appeals erred in failing to grant qualified immunity.

3. Whether the Sixth Circuit Court of Appeals erred in applying the delayed accrual rule of Heck v. Humphrey to an allegation of wrongful seizure, under a warrant, when the items seized were returned well before the criminal charges were dismissed.

4. Whether the Sixth Circuit Court of Appeals erred in holding the plain view doctrine inapplicable to the seizure of papers indicating multiple social security numbers for a single individual.

PARTIES TO THE PROCEEDING

Petitioners

Joel Cunigan, Mark Wiles, Asst. Chief Wayne Grant, Sam Manley, John Telek. The Petitioners have no parent corporations or non-wholly owned subsidiaries. The St. Paul Companies, formerly known as United States Fidelity & Guaranty Company, is not a party to the appeal, but has a financial interest in the outcome of the appeal as the insurer providing a defense under an insurance policy for the City of Richmond, Kentucky and its employees, Joel Cunigan, Mark Wiles, Wayne Grant, Sam Manley and John Telek.

Respondent

Ali Shamaeizadeh, M.D.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit below is reported at 338 F.3d 535 (6th Cir. 2003). Copies of the order denying rehearing and the opinion are set out in Appendix A at pages 1a-2a and Appendix B at pages 3a-39a. The opinion of the District Court for the Eastern District of Kentucky is set out in Appendix C at pages 40a -61a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on July 22, 2003, and a Petition for Rehearing was denied by Order filed on October 16, 2003. This Petition for Writ of Certiorari is filed within 90 days of that Order. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1343(3)-(4) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause,...particularly describing the place to be searched . . . .

42 U.S.C. §1983 (1999) Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ..

STATEMENT OF THE CASE

The factual background of this case has been the subject of four prior opinions of the Sixth Circuit Court of Appeals, including the two civil decisions below and Respondent's two prior Sixth Circuit actions regarding his criminal prosecution. See Shamaeizadeh v. Cunigan, et al., 338 F.3d 535 (6th Cir. 2003)(a copy of which is included in the App., *infra*, 3a -39a); Shamaeizadeh v. Cunigan, et al., 182 F.3d 391 (6th Cir. 1999); United States v. Shamaeizadeh, 80 F.3d 1131 (6th Cir. 1996), United States v. Shamaeizadeh, 41 F.3d 266 (6th Cir. 1994). This statement of the case is taken from these decisions of the Sixth Circuit Court of Appeals, principally the most recent decision.

Operative Facts. Respondent Dr. Ali Shamaeizadeh ("Shamaeizadeh") owned a one-story house with a basement located at 121 Millstone Drive, Richmond, Kentucky (the "residence"). He occupied the main floor with his fiancé, Theresa Schmitt ("Schmitt"), and rented the basement to Brian Reed ("Reed") and Joe Ford ("Ford"). On March 14, 1994, Schmitt placed an emergency call to the Richmond Police Department reporting a possible burglary of the residence.[1] Officer Mark Wiles ("Wiles") was dispatched to the residence, arrived about five minutes later, and Schmitt then invited Wiles into the residence. Schmitt told Wiles that she had passed out on the kitchen table after taking muscle relaxants and consuming a beer. When Schmitt awoke, she noticed that her room key was missing from her pocket. She went into another room and, while she was there, someone allegedly reentered the house and broke the glass top of the kitchen table. Wiles observed broken glass on the kitchen floor. App., *infra*, 5a.

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[1] Shamaeizadeh was not at the residence on this date. App., *infra*, 5a-11a.

Schmitt asked Wiles to search the residence with her, and he proceeded to walk through the main floor of the residence. Wiles discovered a locked door, which Schmitt indicated led to Shamaeizadeh's room. Wiles did not attempt to open the door. Wiles also discovered a broken door, which led to the basement. Wiles did not examine the broken door. Schmitt indicated that she had kicked the door open to use the telephone a few days earlier. Wiles later stated that during this search he detected the odor of growing marijuana. App., *infra*, 5a-6a.

After searching the main floor, Wiles exited the residence via a deck and began searching the backyard. Schmitt entered the basement through the broken door and exited the basement apartment to the backyard. Schmitt then asked Wiles to search the basement, and Wiles performed a search of the basement. Wiles observed several locked doors in the basement. Wiles did not attempt to open any of the doors. He again smelled what he believed to be growing marijuana. Wiles called for Assistant Chief of Police Wayne Grant, because he felt that he needed the assistance of a supervisor. App., *infra*, 6a.

Wiles and Schmitt returned to the kitchen on the main floor of the residence, and waited for Grant to arrive. Schmitt never asked Wiles to leave. While the two were waiting, Schmitt advised Wiles that she believed the other occupants of the house were growing marijuana. Grant arrived, and Wiles briefed him about his activity thus far. Schmitt participated in the conversation. Moreover, Schmitt informed the officers that she would retrieve a key for the locked doors in the basement. Wiles and Grant searched the basement and discovered marijuana cigarette butts, fluorescent light bulbs and fluorescent lighting coming from underneath one of the locked basement doors. Schmitt arrived with a ring of keys, but none of them fit the doors. App., *infra*, 6a-7a

Wiles and Grant then called to Assistant Chief of Narcotics Bill Jesse ("Jesse"), related their observations to him and requested the assistance of an officer experienced in detecting narcotics. Sergeant Joel Cunigan ("Cunigan") was dispatched to the residence at 9:20 pm, and Wiles' supervisor, Sergeant Sam Manley ("Manley"), also arrived at approximately the same time. Wiles and Grant briefed Cunigan and Manley on the situation. All four officers then searched the basement. They did not explicitly ask Schmitt's permission to search the basement, but Schmitt participated in the walk-through of the basement with the officers. App., *infra*, 7a. Cunigan smelled a strong odor that he believed to be growing marijuana. The officers discovered a hemostat, rolling papers, a bag of catnip and a bag of pills. At this time, Schmitt was advised of her rights, and she stated her belief that Reed and Ford were growing marijuana in the basement.[2] Further, Schmitt advised that the smell of marijuana was so strong that she covered the upstairs vents to avoid it. App., *infra*, 7a.

Two search warrants were subsequently issued upon affidavits submitted by Cunigan and later by Detective John Telek. On March 14th, the entire residence was searched pursuant to the first of these warrants (the "first warrant"). The locked doors in the basement were forcibly opened and 393 marijuana plants and growing equipment were discovered. In addition, the officers indicated that they also seized assorted papers, records and jewelry. App., *infra*, 8a.

Respondent's Criminal Prosecution. The case was presented to a federal grand jury and an indictment was returned. Shamaeizadeh was arrested on a federal warrant issued pursuant to the indictment for federal drug law

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[2] After Wiles' initial search, Schmitt also had informed him that some of the other occupants of the house were growing marijuana. App., *infra*, 6a, fn 1.

violations under 21 U.S.C. §§841(a)(1) and 846, and under 18 U.S.C. §§2, and 924(c)(1). Shamaeizdeh was also charged with renting the basement apartment to two tenants for the purpose of unlawfully manufacturing, storing or distributing marijuana under 21 U.S.C. §846. App., *infra*, 9a.

Shamaeizadeh, Reed and Ford moved to suppress the evidence seized pursuant to the first warrant. The magistrate judge concluded Wiles' initial search of the residence was constitutional due to exigent circumstances. The magistrate found the subsequent warrantless searches to be unconstitutional. Cunigan's affidavit was redacted to reflect only the information learned during the initial search and Cunigan's conversations with Schmitt. The magistrate judge then concluded that Cunigan's redacted affidavit provided probable cause to support a warrant to search the main floor of the residence for illegal drug activity, but not as to the basement. App., *infra*, 9a.

The magistrate recommended suppressing the evidence seized from the basement and suppressing all of the evidence seized from the upstairs portion of the residence, except the marijuana, drug paraphernalia and illegally possessed prescription drugs obtained from the upstairs portion of the residence. App., *infra*, 9a, 45a. The district court adopted the magistrate's recommendations. Id. The government appealed the court's suppression of the evidence and the Sixth Circuit Court of Appeals affirmed. App., *infra*, 9a-10a.; see United States v. Shamaeizadeh, 80 F.3d 1131 (6th Cir. 1996). Thereafter, the government moved to dismiss the indictment on April 9, 1996, and Shamaeizadeh filed his civil action on April 8, 1997. Id.; see Shamaeizadeh v. Cunigan, 182 F.3d 391 (6th Cir.), *cert. denied*, 528 U.S. 1021 (1999).

Procedural Nature of This Case. Shamaeizadeh filed his civil action pursuant to 42 U.S.C. §1983 and state law seeking

monetary damages based upon the aforementioned searches, his arrest and subsequent prosecution. Upon motion of the officers, the district court dismissed with prejudice Shamaeizadeh's claims based on illegal search, seizure and subsequent arrest as time barred. App., *infra*, 10a

Shamaeizadeh appealed the dismissal of his civil action. The Sixth Circuit Court of Appeals reversed, and this Court denied *certiorari*. Id. at 10a; see Shamaeizadeh v. Cunigan, supra. The action returned to the district court for discovery. Thereafter, the officers moved for summary judgment, the district court dismissed all of Shamaeizdeh's remaining claims, and Shamaeizadeh appealed. App., *infra*, 10a-11a. The Sixth Circuit Court of Appeals reversed the district court's grant of summary judgment with regard Shamaeizadeh's claims related to the two searches following Cunigan's initial search of the residence and reversed dismissal of Shamaeizadeh's claim that the officers exceeded the scope of the first warrant secured by use of Cunigan's affidavit. The Sixth Circuit affirmed the district court's dismissal of all other claims. App., *infra*, 38a-39a.

REASONS FOR GRANTING THE PETITION

Introduction and Summary of Argument. The Sixth Circuit Court of Appeals improperly put the burden upon the officers to re-ask for consent to continue a search, once consent had already been voluntarily given. The Circuit Court's opinion is in direct contradiction to the numerous circuits and state courts that have held consent continues until revoked, i.e., the continuing consent doctrine. Moreover, the Court of Appeals also improperly put the burden on officers to make subsequent inquiry as to the scope of a continuing search, under circumstances where an individual is actively participating in the search and where consent is not revoked or otherwise limited. By their opinion, the Sixth Circuit now

improperly requires officers to obtain express consent as to the scope of a search, when implied consent is already present.

The Sixth Circuit Court of Appeals erred in applying the particularity requirements of a warrant to a search based upon consent, thereby, creating a *per se* test of express consent, which is a practice that this Court has never allowed in the context of the Fourth Amendment. A "totality of the circumstances" analysis is required for searches by consent. Accordingly, the Sixth Circuit has effectively eliminated the doctrines of continuing and implied consent, although numerous other circuits and states utilize these doctrines.

The Court of Appeals specifically held that "[e]ven if we were to recognize a principle of continuing consent that might extend through three separate searches closely related in time and purpose, the subsequent searches exceeded the scope of Schmitt's initial consent." App., *infra*, 19a. This holding is in direct conflict to the facts as determined by the Court of Appeals, which clearly indicate implied consent on the part of Schmitt to all of the searches. For example, the opinion provides that the officers did not "explicitly" ask for Schmitt's permission to conduct the third search of the basement, but this appellate court acknowledges that she participated in the walk-through of the basement. App., *infra*, 7a. The opinion also recognized that Schmitt provided the officers with keys in an attempt to unlock doors. Id. Accordingly, the decision of the Sixth Circuit Court of Appeals should be reviewed, in order to reverse its error of utilizing a *per se* test of express consent and to resolve the conflict created by the opinion as to the well-established doctrines of continuing and implied consent.

The Sixth Circuit also erred when it extended an overly broad interpretation of Heck v. Humphrey, 512 U.S. 477 (1994) by holding the time for Shamaeizadeh to file his Section 1983 claim for unlawful seizure did not begin to accrue until the

conclusion of the underlying criminal charges against him. App., *infra*, 34a, fn 6. The officers' notes on the first warrant indicate that jewelry and papers belonging to Shamaeizadeh were seized on March 14, 1994. However, Shamaeizadeh testified that these items were returned to him "a couple of months" after the suppression hearing.[3]

The suppression hearing was held on August 14, 1994. Therefore, the time for Shamaeizadeh to file his cause of action for unlawful seizure of his possessions was not contingent upon the outcome of the criminal charges, which were later dismissed against him on April 9, 1996.[4] Rather, the time for Shamaeizadeh to challenge the seizure of his possessions must have accrued at the time his possessions were returned to him on or about October 14, 1994. There is a split among the circuits as to this issue of the tolling of limitations for Section 1983 actions based upon this Court's decision in Heck. Review of this issue is now warranted to resolve the split among the circuits, and to reverse the Sixth Circuit's erroneous interpretation of Heck.

Finally, the opinion of the Sixth Circuit Court of Appeals requires review and reversal as to its holding that the plain view doctrine did not apply to certain "papers" seized on March 14, 1994 pursuant to the first warrant. For purposes herein, the officers solely challenge the appellate court's reversal of the district court finding that the plain view doctrine was applicable to "various documents [that] contained two social security numbers and different but similar sir names for the plaintiff." App., *infra*, 56a. The appellate court rejected the district court's finding that these documents "clearly provided these officers probable cause to believe that plaintiff [Shamaeizadeh]

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[3] Deposition of Ali Shamaeizadeh, M.D. at p. 115-117.

[4] See Shamaeizadeh v. Cunigan, 182 F.3d 391 (6th Cir. 1999).

had false or multiple federal identifications and had forged federal and/or state documents." Id. This decision of the Sixth Circuit Court of Appeals is also in contradiction to the law of Kentucky and other circuits.

I. THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN APPLYING THE PARTICULARITY REQUIREMENTS OF A WARRANT TO A SEARCH BASED UPON CONSENT AND THEREBY, EFFECTIVELY CREATING A *PER SE* TEST REQUIRING EXPRESS CONSENT, AND IGNORED THE APPROPRIATE FOURTH AMENDMENT TEST, THE "TOTALITY OF THE CIRCUMSTANCES."

In Florida v. Bostick, this Court held that *per se* rules are not appropriate in the Fourth Amendment context. Id., 501 U.S. 429, 439 (1991). Recently, this Court revisited the issue of *per se* rules in the context of voluntary consents to searches, and reaffirmed the Bostick requirement that proper inquiry as to consent "necessitates a consideration of 'all the circumstances surrounding the encounter.'" United States v. Drayton, 536 U.S. 194, 201 (2002)(citing Bostick, 501 U.S. at 439). In Drayton, this Court considered not only the verbal consent which was given by at least one of the two individuals being searched, but also considered their actions. 536 U.S. at 198-200. Indeed, the Drayton Court noted in response to the question "do you mind if I check it/you?," that one individual said "go ahead" and lifted his bag, while the other individual did not audibly respond, but rather lifted his hands. Id. Based upon these facts, this Court agreed with the district court's finding that "everything that took place between Officer Lang and Mr. Drayton suggests it was cooperative. There was nothing coercive, there was nothing confrontational about it." Id. at 200. Accordingly, this Court held that consent must be determined by the totality of the circumstances. Id. at 201.

The Sixth Circuit Court of Appeals erred in effectively adopting a *per se* rule that requires officers to obtain additional consent for subsequent searches that are close in time and purpose and to request express consent in every circumstance to verify that implied consent exists or continues. These are the very types of *per se* rules that this Court has repeatedly invalidated. See Drayton and Bostick, supra. The Sixth Circuit gave no reference to either of these cases, but rather relied upon a Supreme Court case concerning a search where consent was not even present. The Sixth Circuit Court of Appeals relied upon Walter v. United States, 447 U.S. 649 (1980) for the proposition that a search authorized by consent is limited by terms of its authorization.[5] App., *infra*, 19a.(citing Walter, 447 U.S. at 656). Respondents do not disagree with this proposition in general; however, Respondents ardently disagree with the way the Sixth Circuit applied it. The decision below uses language from Walter concerning the particularity of searches to hold that searches by consent must be particularly expressed. App., *infra*, 19a.(citing 447 U.S. at 657).

Particularity is always required for the issuance of a valid search warrant, but searches by consent are an exception to the Fourth Amendment, and need not be expressed or given "with particularity" to be valid. Although an individual may condition or limit consent to a search, the explicit particularity requirements of a search warrant have never been demanded for a consensual search. The Sixth Circuit Court of Appeals erred by holding that the officers exceeded the scope of consent by requiring consent to be particularly expressed. As a result, the Sixth Circuit ignored the totality of the circumstances, which this Court has held to be the applicable test for the validity of

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[5] Walter v. United States, 447 U.S. 649 (1980) concerned the FBI's search of mailed film canisters without the consent of either the consignor or consignee of the shipment.

a consensual search. By ignoring the totality of the circumstances, the Sixth Circuit Court of Appeals effectively invalidated the recognized doctrines of continuing consent and implied consent, as will be discussed herein.

Furthermore, the untoward result of the Sixth Circuit's erroneous ruling is that law enforcement officials are now burdened with having to obtain additional consent for subsequent searches that are conducted close in time and purpose and to obtain explicit verification of any implied consent. Such a result totally ignores the overall circumstances, and the totality of the circumstances test should have been the standard applied by the Sixth Circuit to measure the validity and scope of the consent.

A. THE SIXTH CIRCUIT COURT OF APPEALS EFFECTIVELY INVALIDATED THE DOCTRINE OF CONTINUING CONSENT AND WRONGFULLY PLACED A BURDEN UPON OFFICERS TO ALWAYS OBTAIN ADDITIONAL CONSENT FOR SUBSEQUENT SEARCHES.

The Sixth Circuit Court of Appeals wrongfully applied the particularity requirements of a warrant in analyzing the issue of whether multiple searches of a residence are constitutional, based upon the continuing consent of a co-habitant. It is black-letter law that consent obviates the need for a warrant. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Further, valid consent may be given by a co-habitant even though no other co-habitant has consented. United States v. Matlock, 415 U.S. 164, 171 n. 7 (1974).

In the matter *sub judice*, Respondent Shamaeizadeh was not present at the residence on March 14, 1994, and it is undisputed that Schmitt called the police and invited the police to enter the residence and perform a thorough search. The Sixth Circuit Court of Appeals recognized that had Schmitt's consent been

"continuing," the second and third warrantless searches of the residence would have been constitutional. See App., *infra*, 19a. However, the Court of Appeals improperly held that in order for the officers to obtain such continuing consent, they were required once again to ask Schmitt for her consent after Wiles' initial search of the residence.[6] This holding is in direct conflict with the other circuits and numerous states, all of which have held that consent continues until it is revoked. Further, the facts did not provide the appellate court with any opportunity to deviate from the doctrine of continuing consent.

"Schmitt asked Wiles to search the residence with her, and he proceeded to walk through the main floor of the residence." App., *infra*, 5a. After searching the main floor, the backyard and the basement, Wiles and Schmitt returned to the kitchen and waited together for a supervisor, Assistant Chief Grant, to arrive. "Schmitt never asked Wiles to leave." App., *infra*, 6a (*Emphasis added*). Thereafter, Schmitt participated in conversations with the officers and provided keys in an attempt to open locked doors. Id. at 7a. There is no evidence in the record that Schmitt ever revoked her initial consent or objected to any subsequent search performed by the officers. Indeed, she was an active participant in each search. Despite the above facts, all of which are noted in the appellate opinion, the Sixth Circuit Court of Appeals ignored the doctrine of continuing consent and improperly placed a burden upon the officers to seek and obtain additional consent from Schmitt. Pertinent portions of the appellate opinion provide as follows:

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[6] The appellate court affirmed the district court's decision that Shamaeizadeh had no privacy interest in the basement and had no standing to assert a constitutional violation on behalf of Ford or Reed. Therefore, Shamaeizadeh's claims were properly considered only in the context of the main floor of the residence. App., *infra*, 14a.

> When Grant arrived, Wiles briefed him about his activity thus far. Schmitt participated in the conversation, informing the officers that she would retrieve a key for the locked doors in the basement. App., *infra*, 6a.
>
> Wiles and Grant then conducted a second search of the basement apartment. **They did not ask Schmitt's permission to conduct the search.** App., *infra*, 7a. (*emphasis added*).
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> * * * *
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> **They did not explicitly ask Schmitt's permission to conduct the third search**, but Schmitt participated in the walk-through of the basement. App., *infra*, 7a. (*emphasis added*).
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> * * * *
>
> The officers could not have had an objectively reasonable belief that the second and third searches were within the course of Schmitt's consent. Schmitt clearly consented to Wiles's first search of the premises when she asked him to search for an intruder. **But the officers did not assert that Schmitt explicitly consented to the second or third search.** In fact, they admit that they did not expressly request her consent when additional officers arrived to search the residence and that they do not recall Schmitt expressly articulating any such consent on her own volition. App., *infra*, 20a. (*emphasis added*).

The burden was not on the officers to seek additional consent from Schmitt, as she never revoked her initial consent nor objected to any of the searches. This Court has held that a vehicle may be searched in absence of a warrant or probable cause, when a person in control has given voluntary consent to search. Schneckloth v. Bustamonte, supra. In applying this

now black-letter law, the federal courts from various circuits have also recognized the doctrine of continuing consent with regard to searches of vehicles. In United States v. Santuro, the Fourth Circuit Court of Appeals held that "this court has specifically ruled that failure to object to the continuation of a search indicates that the search was conducted within the scope of the consent given." 29 F.3d 550, 553 (4th Cir. 1994)(citations omitted). Relying upon other Supreme Court precedent, the Santuro Court further held that although a person may limit his consent, general consent also includes the consent to search closed containers within a vehicle. Id. (citing Florida v. Jimeno, 500 U.S. 248 (1991).

The above cases are clearly analogous to continuing consent in the context of the search of a residence. Indeed, in the matter *sub judice*, the Sixth Circuit Court of Appeals relied upon the vehicular search case of Jimeno, supra., in which this Court held an officer was not required to separately request permission to search containers within an automobile's interior, because the driver had already given his consent to a search of his vehicle. 500 U.S. at 251-52. The lower level federal courts are also consistently applying the continuing consent doctrine based upon their own circuit's precedent. "Where a person fails to object to a search exceeding the scope of consent the person has given, the further search is objectively reasonable." United States v. Morris, 910 F.Supp. 1428, 1448 (N.D. Iowa 1995)(citing United States v. Gleason, 25 F.3d 605, 607 (8th Cir. 1994)); United States v. Sanchez, 866 F.Supp. 1542, 1555 (D. KS. 1994)(citing United States v. Lewis, 24 F.3d 79, 81 (10th Cir.), *cert. denied*, 513 U.S. 905, 115 S.Ct. 271, 130 L.Ed.2d 189 (1994)(additional citations omitted)); United States v. Walker, 922 F.Supp. 724, 731 (N.D. NY 1996)(citing United States v. Snow, 44 F.3d 133, 135 (2d Cir. 1995)).

Unlike the foregoing circuits, the Sixth Circuit Court of Appeals refused to recognize that Schmitt's failure to object to

the subsequent warrantless searches amounted to her continuing consent to the searches.[7] Rather, the Sixth Circuit placed the burden upon the officers to obtain Schmitt's consent expressly for both the second and third warrantless searches. This burden is not in accord with the other circuits that have addressed this issue and is otherwise inconsistent with this Court's precedent establishing the "totality of the circumstances" as the applicable test for consensual searches.

The case law as to continuing consent is well developed in the state courts. Once consent is granted, it continues until unequivocally revoked or withdrawn. E.g., Underwood v. State, 462 S.E.2d 434 (Ga. Ct. App. 1995); Davidson v. State, 516 S.E.2d 550 (Ga. Ct. App. 1999) (consent to search home & apartment continues); Boggs v. State, 390 S.E.2d 423 (Ga. Ct. App. 1999) (consent to search a vehicle continues). The rule in Kentucky is consistent. See, e.g., Smith v. Commonwealth, 246 S.W. 449 (Ky. 1923) (consent, once granted, cannot be revoked). Oregon courts hold likewise: once consent is granted, officers do not have to seek additional consent for each subsequent element of another search. State v. Luther, 663 P.2d 1261, 1263 (Ore. App. 1983).

In practical application, a lapse of time between the consent and the search does not require reaffirmation of consent to a subsequent search. State v. Koucoules, 343 A.2d 860 (Me.

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[7] The Sixth Circuit held three searches of Shamaeizadeh's residence were "closely related in time and purpose." App., *infra*, 14a. That notwithstanding, any delay between the searches is not controlling as to the issue of continuing consent. See e.g., United States v. White, 617 F.2d 1131 (5th Cir. 1980) (upholding a two day delay in a consensual search of van where there was no indication of withdrawal of consent).

1974).[8] Persons can consent to the searches of premises over which they exercise control and have authority to use, and this consent originally given has been held to carry over to a second search over four hours later. Morrison v. State, 508 S.W.2d 827, 828-29 (Tex. Crim. App. 1974). Relying upon Morrison, the Texas Court of Appeals held a live-in girlfriend's initial consent to several officers to the search of her boyfriend's residence continued to a second search two hours later by the officers. Hawkins v. State, 968 S.W.2d 382 (Tex. Civ. App. 1997). "While Minchew denied giving consent to the officers to enter the apartment in the first place, the undisputed evidence establishes that she encouraged the return to the scene and the arrest. According to the testimony of the police officers, she did nothing to revoke her consent to enter the apartment. We therefore agree with the State and hold the consent given by Menshew carried over to the second entry of the apartment." Id. at 385.

Further, initial consent for entry by a single officer has been held to continue to subsequent entries by the single officer and numerous other officers, based upon the doctrine of continuing consent. In Phillips v. State, 625 P.2d 816 (Alaska 1980), the Supreme Court of Alaska found "[t]he continuing nature of Mike Yakasoff's consent was shown by his failure to object to the re-entry of the police, after his brother mentioned the knife, and to the ensuing stepped up investigation by Little, Pacheco and the investigators." Id., at 818. Similarly, in State v. Luther, supra, the Oregon Court of Appeals upheld a second

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[8] E.g., Gray v. State, 441 A.2d 209 (Del. 1981) (upholding search with interim of nearly twenty hours between time of consent and time of search); People v. Trujillo, 576 P.2d 179 (Colo.App. 1977) (upholding second search of automobile two days after first consensual search); People v. Nawrocki, 150 N.W.2d 516 (Mich.App. 1967) (upholding second search of car pursuant to consent given only once).

search of a bedroom upon the resident's continuing consent. The Oregon Court, relying upon Phillips v. State, held that "[a]bsent express revocation of an initial consent, i.e., absent objection to a subsequent, closely related entry and search after the initial consensual entry and search, the permitted inference is that the initial consent continued." Id.

The Sixth Circuit Court of Appeals recognized that Luther and Phillips, supra, do, in fact, stand for "a principle of continuing consent, which allows officers to execute subsequent, closely-related searches in the absence of an objection because the absence of objection permits inference that the initial consent continued." App., *infra*, 20a. Petitioners have presented many other state cases that also stand for the principle of continuing consent, however, the lower courts still need guidance from this Court. As the Supreme Court of Alaska stated in Phillips, back in 1980, "there is relatively little authority on this question but what authority there is supports our view." Id., 625 P.2d at 818. Since 1980, the authority has developed substantially in the state courts, and all of it points to a continuing consent doctrine that places the burden on the individual to object or revoke consent once given.

The federal cases presented by the Petitioners also recognize this same legal principal of continuing consent. That being, the "failure to object to the continuation of a search indicates that the search was conducted within the scope of the consent given." United States v. Santuro, 29 F.3d 550, 553 (4th Cir. 1994)(citations omitted). This Fourth Circuit holding is squarely in conflict with the Sixth Circuit's decision below.

Schmitt never once objected to any of the searches performed by the officers, therefore, her initial consent continued to the subsequent two warrantless searches that were closely related in time and purpose. The totality of the circumstances was not considered by the appellate court below.

Moreover, the Sixth Circuit's decision to place the burden upon the officers to seek and obtain consent from Schmitt for their subsequent warrantless searches was improper. Quite simply, the Sixth Circuit Court of Appeals has invalidated the widely recognized doctrine of continuing consent. Review and reversal is warranted. Otherwise, officers in this Circuit will face the unnecessary and undue burden of continually asking and re-asking for consent, a requirement that this Court has repeatedly held is not necessary when the totality of the circumstances indicate consent was given.

B. THE SIXTH CIRCUIT COURT OF APPEALS EFFECTIVELY INVALIDATED THE DOCTRINE OF IMPLIED CONSENT AND WRONGFULLY PLACED A BURDEN UPON OFFICERS TO ALWAYS OBTAIN EXPRESS CONSENT FOR SEARCHES.

Although recognizing that the initial and two subsequent searches *sub judice* were "closely related in time and purpose," the Sixth Circuit nonetheless refused to apply the doctrine of continuing consent, finding that the subsequent searches exceeded the scope of consent. "But even if we were to recognize a principle of continuing consent that might extend throughout three separate searches closely related in time and purpose, the second and third searches exceeded the scope of Schmitt's initial consent." App., *infra,* 19a.[9] Such a decision ignores the totality of the circumstances as to the granting of consent, and creates an impermissible *per se* rule that express consent must always be obtained for subsequent searches. This

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[9] The Sixth Circuit opinion relies upon United States v. Keszthelyi, 308 F.3d 557 (6th Cir. 2002), which interestingly acknowledges that the Sixth Circuit and numerous other circuits recognize a reasonable continuation rule for searches pursuant to warrant. Id. at 568(citing United States v. Bowling, 351 F.2d 236, 241 (6th Cir. 1965)(additional citations omitted)).

Court has prohibited the use of such *per se* rules in the Fourth Amendment context. Florida v. Bostick, 501 U.S. 429, 439 (1991); United States v. Drayton, 536 U.S. 194, 201 (2002) Moreover, the doctrine of implied consent, which the Sixth Circuit has effectively rejected, is based upon a totality of the circumstances analysis, which this Court has endorsed for Fourth Amendment purposes. Id. Accordingly, review and reversal is warranted to align the Sixth Circuit with the analysis of the other circuits, which conforms to this Court's mandates in Bostick and Drayton, supra.

The doctrine of implied consent is recognized throughout the circuits. "A person's consent may be inferred from his or her words, gestures, and conduct." United States v. Barahona, 990F.2d 412, 418 (8th Cir. 1993)(citing United States v. Buettner-Janusch, 646 F.2d 759, 764 (2d Cir.), *cert. denied*, 454 U.S. 830, 102 S.Ct. 126, 70 L.Ed.2d 107 (1981)); e.g., United States v. Griffin, 530 F.2d 739, 742 (7th Cir. 1976); United States v. Chaidez, 996 F.2d 377, 382 (8th Cir. 1990)(cooperation evidences voluntary consent)(citations omitted); United States v. Sanchez, 866 F.Supp. 1542, 1555 (D. KS 1994)(citing United States v. Sanchez-Valderuten, 11 F.3d 985, 991 (10th Cir. 1993)(defendant's conduct while search taking place indicates he freely consented to the search)).

The totality of the circumstances in the matter *sub judice*, clearly indicates Schmitt gave implied consent to the subsequent searches of the residence. In reaching its holding that the subsequent searches exceeded the scope of her initial consent, the appellate court below did not properly give consideration to all of the facts, as is required by this Court. Bostick and Drayton, supra. Schmitt's words and actions, viewed in their totality, leave no doubt that implied consent was given for subsequent searches of the residence, and analysis of their totality was required under this Court's precedence of Bostick and Drayton, supra.

Further, this analysis is also required under the doctrine of implied consent as indicated by the case law from the numerous jurisdictions cited above. For example, the Eighth Circuit Court of Appeals holds a person's consent may properly be inferred from words, gestures, and conduct. United States v. Gleason, 25 F.3d 605, 607 (8th Cir. 1994). The Eighth Circuit's analysis allows consent to be inferred from the conduct and demeanor of the consenting person during the search, such as friendly behavior, lack of hostility or "chatting" with officers, all of which is consistent with this Court's analysis in Drayton, 536 U.S. at 200 (2002). See e.g. Gleason, 25 F.3d at 607; United States v. Barahona, 990 F.2d 412, 417-18 (8th Cir. 1993)(passively looking on or actively assisting rather than objecting indicates consent).

The Fourth Circuit Court of Appeals has incorporated the totality of the circumstances into its implied consent analysis in a factually similar case to that of Shamaeizadeh. In United States v. Hylton, 349 F.3d 781 (4th Cir. 2003), the Fourth Circuit was presented facts concerning the suppression of evidence based upon a live-in girlfriend's implied consent to search an apartment that she shared with the defendant. A district court in Maryland, like the Sixth Circuit Court of Appeals below, wrongfully placed a burden upon an officer to obtain express consent, under circumstances where implied consent was evident from the totality of the circumstances. The analysis of the district judge was as follows:

> I do not conclude that there was consent. **There is no testimony that there was any express consent** from Ms. Harper **or even an attempt to get consent from her**, nor do I find there circumstances analogous to those in which there can be implied consent. The call was I can't get into my apartment, not anything beyond

> that. I simply don't find this sufficient to indicate that Ms. Harper had impliedly consented to the entry.

Hylton, 349 F.3d at 784(*emphasis added*).

Unlike the Sixth Circuit, the district court in Hylton at least gave consideration to whether implied consent existed, although the district court still wrongfully placed a *per se* burden on the officers to obtain express consent, as did the Sixth Circuit below. The Fourth Circuit Court of Appeals affirmed the district court's decision denying the motion to suppress based on implied consent, finding it unnecessary to address the alternate theories relied upon by the district court. 349 F.3d at 787. However, the Fourth Circuit clearly rebuked the district court's *per se* requirement of express consent. "While Harper therefore had authority to give consent to a search of her apartment and bedroom, the district court found that Harper never gave *express* consent for such a search." Id. at 786 (*emphasis in original*). The Fourth Circuit relied upon three appellate opinions, two from other circuits, to determine that implied consent existed for the officers' search. Id.(citing United States v. Wilson, 895 F.2d 168, 170 (4th Cir. 1990); United States v. Wesela, 223 F.3d 656, 661 (7th Cir. 2000); United States v. Buettner-Janusch, 646 F.2d 759, 764 (2d Cir. 1981). Accordingly, the Fourth Circuit has rejected the *per se* express consent burden that the district court of Maryland and the Sixth Circuit below have imposed on law enforcement.

The federal courts of New York have also adopted this analysis, relying upon opinions from the Eighth Circuit Court of Appeals and this Supreme Court. E.g., United States v. Walker, 922 F.Supp. 724, 728 (N.D. N.Y. 1996)(considering the "totality of the circumstances"). As evidenced by the opinion *sub judice*, the Sixth Circuit Court of Appeals is effectively applying a *per se* rule as to the "explicitness" of consent, requiring officers to expressly verify conduct and

gestures that otherwise unequivocally indicates implied consent to subsequent searches conducted close in time and purpose.

In addition to the above, the case of Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed2d 297 (1991), which was specifically relied upon by the Sixth Circuit Court of Appeals, requires lower courts to consider the issue of consent under an objective reasonableness standard, i.e., totality of the circumstances. App., *infra*, 18a. The "standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness–what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Jimeno, 500 U.S. at 251, 114 L.Ed2d 297. After her initial request for assistance and after completion of the initial search of the residence, Schmitt waited inside her own kitchen with the officer; then participated in conversations with the officer and his supervisor indicating she would retrieve keys to unlock doors; provided the officers with keys and participated in both the second and third searches of the residence. Clearly, a reasonable person would have understood her conduct as implied consent for these searches.

The Court of Appeals below looked only to the initial request of Schmitt to search the residence for a possible burglary, and held this request did not objectively indicate consent for the second and third warrantless searches. This result erroneously ignores the words, conduct, gestures and actions of Schmitt, when she voluntarily participated and assisted the officers in the subsequent searches. Further, it imposes a *per se* burden on officers to obtain express consent for any subsequent searches beyond the initial search.

This Sixth Circuit holding is also in direct conflict with state court precedents that recognize the doctrine of implied consent. See, e.g., State v. Powell, 357 N.W.2d 146 (Minn. Ct. App. 1984)(relying upon Walter v. United States, 447 U.S. 649

(1980)). The Minnesota Court in Powell acknowledges the case of Walter v. United States, supra, as does the Sixth Circuit opinion below, but recognizes that consent can also be implied by the totality of the circumstances in an approach that follows precedent in the Seventh Circuit Court of Appeals and Minnesota Supreme Court. 357 N.W.2d at 149 (citing United States v. Griffin, 530 F.2d 739, 742 (7th Cir. 1976); Watts v. State, 305 N.W.2d 860, 862 (Minn. 1981)). The approach of the Seventh Circuit and these state court precedents (as well as the Second, Fourth, Eighth and Tenth Circuits, cited above) conflicts with the Sixth Circuit's decision below in that all of these other jurisdictions recognize implied consent.

The language of the opinion below clearly indicates that the Sixth Circuit Court of Appeals improperly placed a *per se* burden upon these officers to obtain express consent. This Court has invalidated the Eleventh Circuit's attempt to place a *per se* burden of requiring officers to notify suspects of their right to refuse consent to a search. United States v. Drayton, 536 U.S. 194 (2002). Review and reversal is now required or the Sixth Circuit will operate under a *per se* test that requires officers to always obtain express consent. This will place an unnecessary and undue burden upon law enforcement officers, lessening their ability to perform their jobs and exposing them for liability, under circumstances where consent is either continuing or implied.

II. THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO GRANT QUALIFIED IMMUNITY.

Police officers enjoy a qualified or 'good faith' immunity from suit for damages. Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967). The defense of qualified immunity grants officers such immunity unless their conduct violates "clearly established statutory or constitutional

rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action generally turns on the 'objective legal reasonableness' of the action assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citing Harlow, 457 U.S. at 818-819).

The Sixth Circuit Court of Appeals granted qualified immunity to the officers with regard to their objective belief that they had probable cause to search the entire residence under the first and second search warrants. App., *infra*, 24a-31a. "Thus, the officers had probable cause for both warrants to search the basement and, as discussed above, reasonably could have believed on the facts of this case that this established probable cause for searches of the entire residence in light of the information available to them at this time." Id. at 30a-31a. The Sixth Circuit relied upon the actions of the co-habitant, Schmitt, in arriving at its holding of qualified immunity, including her use of the "kicked-in" door to go through the basement and to the back yard, her leading the officers into the basement and her statement of using the phone in the basement (she also provided keys that she thought would open the doors in the basement). Id. at 29a-30a.

The Sixth Circuit's finding of qualified immunity for the officers' warrant searches cannot be reconciled with its denial of qualified immunity as to the warrantless searches. The reason being, the Sixth Circuit Court of Appeals wrongfully required evidence of express consent on the behalf of the co-habitant, Schmitt, and ignored her words and actions that demonstrated continuing and/or implied consent for the warrantless searches. There was no clearly established law at the time of the searches that indicated to these officers that additional express consent was required for the second and

third searches. Schmitt had already given her consent for the initial search, and her words and actions thereafter gave the officers' an objectively reasonable belief that her consent either continued or was implied for the second and third searches.

Additional express consent was not necessary. Indeed, the law at the time indicated that additional express consent was not required. United States v. Barahona, 990F.2d 412, 417-18 (8th Cir. 1993)("A person's consent may be inferred from his or her words, gestures, and conduct," as passively looking or actively assisting rather than objecting indicates consent); see, e.g. United States v. Chaidez, 996 F.2d 377, 382 (8th Cir. 1990)(cooperation evidences voluntary consent). Furthermore, a *per se* rule requiring additional express consent for subsequent searches violates the precedent of this Court. Florida v. Bostick, 501 U.S. 429, 439 (1991)(*per se* rules are not appropriate in the Fourth Amendment context); United States v. Drayton, 536 U.S. 194, 201 (2002). Accordingly, review and reversal is warranted as to the Sixth Circuit Court of Appeals' denial of qualified immunity.

III. THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN APPLYING THE DELAYED ACCRUAL RULE OF HECK V. HUMPHREY TO THE ALLEGATION OF WRONGFUL SEIZURE, UNDER A WARRANT, WHEN THE ITEMS SEIZED WERE RETURNED WELL BEFORE THE CRIMINAL CHARGES WERE DISMISSED.

Heck v. Humphrey, 512 U.S. 477 (1994) has created and continues to create confusion in the lower courts. Heck's holding can be interpreted in two ways, and as a result, lower courts have applied it inconsistently.[10] On one hand, Heck can

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[10] The Sixth Circuit and two other circuits broadly interpret Heck. E.g., Covington v. City of New York, 171 F.3d 117 (2d Cir. 1999), *cert. denied*,

be read broadly to establish a new favorable-termination element for all §1983 claims that amount to civil attacks on criminal proceedings. On the other hand, it can be read narrowly, in accordance with its facts, to require a favorable termination only for convicted prisoners currently held in state custody. See Heck, 512 U.S. at 499-500 (Souter, J., concurring) (discussing the two ways that the Heck majority opinion can be read and concluding Heck should only apply to a convicted prisoner "caught at the intersection of §1983 and the habeas statute [28 U.S.C. §2254]").

In the matter *sub judice*, the Sixth Circuit Court of Appeals has further extended its already broad interpretation of Heck to circumstances of a civil plaintiff's claim of unlawful seizure, when the seizure concerned items unrelated to the underlying criminal action against him and when the items were returned to him well before the charges against him were dismissed. App., *infra*, 34a-35a, fn 6. The items were jewelry and papers. In denying Petitioners' argument that the statute of limitations began to run at the time of return of these items to Shamaeizadeh, the Court of Appeals extended its earlier, overly broad reading of Heck even further to claims of unlawful seizure.

The Sixth Circuit Court of Appeals has already relied upon an earlier opinion involving the same parties hereto and extended its analysis to *Bivens* actions. Ruff v. Runyon, 258

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528 U.S 946 (1999); Mackey v. Dickson, 47 F.3d 744 (5th Cir. 1995). Four circuits narrowly interpret Heck. E.g., Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (stating "Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so in all cases these claims can go forward"); Simmons v. O'Brien, 77 F.3d 1093 (8th Cir. 1996); Trimble v. City of Santa Rosa, 49 F.3d 583 (9th Cir. 1995); Datz v. Kilgore, 51 F.3d 252 (11th Cir. 1995).

F.3d 498 (6th Cir. 2001)(citing Shamaeizadeh v. Cunigan, 182 F.3d 391 (6th Cir.), *cert. denied* 528 U.S. 1021 (1999)). Likewise, the Sixth Circuit relied on its earlier opinion for purposes of its holding in the matter *sub judice*. App., *infra*, 35a, fn 6. No doubt, the minority of the circuits that broadly read Heck as applicable to all §1983 claims will soon cite the Sixth Circuit's analysis for purposes of unlawful seizure claims as well. This Court's review is now warranted to resolve this split in the circuits.

In addition to the above, the Sixth Circuit's opinion below is illogical on its face. The Sixth Circuit creates a new standard of "impossibility" in its conclusion that "it would have been impossible to conclude during the course of Shamaeizadeh's criminal proceeding that the seized jewelry and papers would not have been used as evidence of the alleged illegality." App., *infra*, 34a, fn.6. To achieve its desired result of extending Heck, the appellate court below ignored the fact that these seized items had already been returned to Shamaeizadeh. See App., *infra,* 34a-35a, fn. 6. This appellate court justified its result by concluding that the jewelry "could have been admitted as evidence up to the last day of trial." Id.[11] Such conclusion ignores the chain of custody that was broken when the jewelry and papers were returned to Shamaeizadeh and further ignores the extreme unlikelihood that any such seized property would ever be deemed relevant in a criminal drug conspiracy trial. This Court's review and reversal of the erroneous decision below is therefore required.

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[11] The appellate court below made no mention of the papers that were once seized and then returned.

IV. THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THE PLAIN VIEW DOCTRINE INAPPLICABLE TO THE SEIZURE OF PAPERS INDICATING MULTIPLE SOCIAL SECURITY NUMBERS FOR A SINGLE INDIVIDUAL.

Officers may properly seize evidence without a warrant if that evidence is "(1) in plain view; (2) of a character that is immediately incriminating; (3) viewed by an officer lawfully located in a place from where the object can be seen; and (4) seized by an officer who has a lawful right of access to the object itself." United States v. Roark, 36 F.3d 14, 18 (6th Cir.1994) (citing Horton v. California, 496 U.S. 128 (1990)). Generally, the relevant inquiry focuses on the second prong, that of the "immediate incriminating" character of the item. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).

The appellate court below held that assuming the three other factors above, the papers seized from Shamaeizadeh during the first warrant search for marijuana were not "immediately incriminating," so the seizure was unconstitutional. App., *infra*, 31a-34a. The court below further denied the officers qualified immunity on this issue, concluding that it would require "far more than an instant" to conclude that any of the documents implicated criminal activity." Id. at 33a. The court below erred in this conclusion as to the papers and ignored the factual findings of the district court, which found as follows: "These documents detailed what the officers presumed to be multiple identities for the plaintiff. The documents contained two social security numbers and different but similar sir names for the plaintiff." App., *infra*, 56a.

A plain view seizure is "presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." Texas v. Brown, 460 U.S. 730, 742

(1983). It is "presumptively reasonable" that the appearance of two social security numbers for one individual is evidence of criminal activity under federal and state law. Forged instruments are unlawful in Kentucky. See KRS 516.010 - KRS 516.070. Moreover, the Sixth Circuit's newly announced standard of "taking more than an instant" is just another attempt at applying a *per se* rule, erroneous in itself, and especially when analysis of objective reasonableness is required with respect to these officers' qualified immunity.

Approximately two years before the officers' seizure of these papers, the Supreme Court of Kentucky addressed use of the very standard that the Sixth Circuit Court of Appeals imposed on these officers' conduct. In Hazel v. Commonwealth, 833 S.W.2d 831 (Ky. 1992), an officer searching a home for marijuana and cocaine located fifty photographs in a drawer. The first photo seen was not immediately incriminating in nature, as it depicted a nude adult male. 833 S.W.2d at 832. The officer continued his search for drugs by lifting up the photos, and discovered a photo of a young female performing cunnilingus, and other similar photos were then briefly reviewed. Id. The photos were seized under the plain view exception to the Fourth Amendment, and the Supreme Court of Kentucky held it irrelevant that the top photograph was not indicative of criminal activity, since the officer had a search warrant to look for drugs. Id. at 834. Federal courts have similarly held. E.g. United States v. Medows, 540 F.Supp. 490, 500 (S.D.N.Y. 1982)(stating that the law allows officers to briefly peruse documents discovered under the plain view doctrine and citing Second Circuit precedent).

Review and reversal is required as to the officers *sub judice*, as their seizure of Respondent's papers was constitutional. At a minimum, their seizure of all papers indicating multiple social security numbers was objectively

reasonable, entitling these officers to the protection of qualified immunity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 01-6326

[Filed October 16, 2003]

ALI SHAMAEIZADEH, Plaintiff-Appellant	)
v.	)
JOEL CUNIGAN; MARK WILES; WAYNE GRANT, Asst. Chief; SAM MANLEY; JOHN TELEK; RICHMOND POLICE DEPARTMENT; CITY OF RICHMOND, KENTUCKY, Defendants-Appellees	)

JUDGES: BEFORE: MOORE and ROGERS, Circuit Judges; KATZ,* District Judge.

* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

ORDER

Upon consideration of the petition for rehearing filed by the appellees,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 01-6326

[Filed July 22, 2003]

ALI SHAMAEIZADEH, Plaintiff-Appellant,

v.

JOEL CUNIGAN et al., Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington
No. 97-00121
Karl S. Forester, Chief District Judge

JUDGES: Before: MOORE and ROGERS, Circuit Judges; KATZ, District Judge.*

* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant Dr. Ali Shamaeizadeh ("Shamaeizadeh") appeals the district court's grant of summary judgment for Defendants-Appellees with respect to Shamaeizadeh's § 1983 claims and his state law malicious prosecution claim. On March 14, 1994, the Richmond Police Department received a call reporting the burglary of Shamaeizadeh's residence ("the residence"). An officer responded to the call and searched the residence for the burglar. The officer then called for assistance and conducted a second search with one of his supervisors. After discovering evidence of drug paraphernalia during the second search, the two officers called narcotics experts to the scene to participate in a third search. Based on the evidence discovered, the officers secured and executed two search warrants for the residence. Shamaeizadeh was indicted for federal drug violations, but the charges were dismissed after the district court suppressed the evidence seized from the basement of the residence.

Shamaeizadeh filed a § 1983 action including federal claims and a state law malicious prosecution claim against the City of Richmond, Kentucky, the Richmond Police Department, and five individual officers ("the officers") in their individual and official capacities. Shamaeizadeh argues that he is entitled to damages for the following reasons: (1) the second and third warrantless searches were unconstitutional; (2) there was no probable cause for either search warrant; (3) the officers exceeded the scope of the first search warrant; (4) the officers included misrepresentations in the affidavit supporting the second warrant; (5) the officers arrested him without probable cause; (6) he was maliciously prosecuted; and (7) the City of Richmond failed properly to train and supervise its police officers. The district court granted summary judgment to the defendants on all grounds.

We REVERSE the district court's grant of summary judgment with respect to the second and third warrantless searches, and with respect to Shamaeizadeh's claim that the officers exceeded the scope of the first search warrant. We AFFIRM the district court on all other grounds.

I. FACTS AND PROCEDURE

Shamaeizadeh owned a one-story house with a basement, located at 121 Millstone Drive, Richmond, Kentucky. He occupied the main floor of the residence with his fiancee, Theresa Schmitt ("Schmitt"), and rented the basement to Brian Reed ("Reed") and Joe Ford ("Ford"). All four residents of the house regarded the basement as a separate apartment.

On March 14, 1994, Schmitt placed an emergency call to the Richmond Police Department, reporting a possible burglary of the residence. Officer Mark Wiles ("Wiles") was dispatched and arrived five minutes later. Schmitt met Wiles at the front door, invited him into the residence, and walked into the kitchen. She told Wiles that she had left the back door open for her cats, and then had passed out on the kitchen table after taking muscle relaxants and consuming a beer. When Schmitt awoke, she noticed that her room key was missing from her pocket. She went into another room and, while she was there, someone allegedly reentered the house and broke the glass top of the kitchen table. Wiles observed broken glass on the kitchen floor.

Schmitt asked Wiles to search the residence with her, and he proceeded to walk through the main floor of the residence. Wiles discovered a locked door, but did not attempt to open it because Schmitt said that it was Shamaeizadeh's room and that Shamaeizadeh kept it locked when he was away. Wiles also discovered a broken door, which led to the basement. He did

not examine the broken door because Schmitt said she had kicked it open to use the telephone a few days earlier. Wiles later said that during this search he detected the odor of growing marijuana.

After searching the main floor of the house, Wiles moved onto a deck overlooking the backyard and searched the rear of the premises. Meanwhile, Schmitt entered the basement through the broken door, walked out through the back door of the basement apartment, and met Wiles in the backyard. Explaining that the occupants of the basement apartment were away on spring break, she asked Wiles to check the basement. Wiles proceeded to search the basement.

During his search, Wiles noticed that the basement contained several rooms. Many of the doors were locked, and Wiles did not attempt to open them. He did smell what he thought was growing marijuana. After walking through the basement, Wiles called Assistant Chief of Police Wayne Grant ("Grant") because he believed he needed the assistance of a supervisor.

Wiles and Schmitt returned to the kitchen and waited for Grant to arrive.[1] Schmitt never asked Wiles to leave. While they were waiting, Schmitt told Wiles that she believed the "government" was the burglar. Wiles was thus inclined to discredit Schmitt's allegations of burglary. When Grant arrived, Wiles briefed him about his activity thus far. Schmitt participated in the conversation, informing the officers that she would retrieve a key for the locked doors in the basement.

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[1] Shamaeizadeh conceded at oral argument that, at some point prior to the second search, Schmitt informed Wiles that she believed that some of the other occupants of the house were growing marijuana.

Wiles and Grant then conducted a second search of the basement apartment. They did not ask Schmitt's permission to conduct the search. When they entered the basement, Wiles again smelled what he suspected was marijuana. The officers discovered small marijuana cigarette butts, known as "roaches," in an ashtray. They also found boxes of fluorescent light bulbs under the apartment stairway and observed fluorescent lighting in one of the locked rooms turn on and off intermittently. They suspected that the fluorescent lighting was being used to grow marijuana because it is often used for that purpose. Schmitt arrived with a ring of keys, but none of them fit the locked doors.

Wiles and Grant then called Assistant Chief of Narcotics Bill Jesse ("Jesse"). They related their observations to him and requested the assistance of an officer experienced in detecting narcotics. Jesse dispatched Sergeant Joel Cunigan ("Cunigan") to the scene. Cunigan arrived at 9:20 p.m., approximately the same time that Wiles's immediate supervisor, Sergeant Sam Manley ("Manley"), arrived. Wiles and Grant briefed Cunigan and Manley on the situation. Then all four officers conducted a third search of the basement apartment. They did not explicitly ask Schmitt's permission to conduct the third search, but Schmitt participated in the walk-through of the basement.

When the officers entered the basement during the third search, Cunigan smelled a strong odor that he believed to be growing marijuana. The officers discovered a hemostat; rolling papers; a plastic bag of what was suspected to be marijuana, but was actually catnip; and a bag containing a variety of pills. At this point, they advised Schmitt of her rights. Schmitt stated her belief that Reed and Ford were growing marijuana in their basement apartment. According to Schmitt, although she never saw marijuana, the scent was so strong that she covered her vents to avoid it, particularly at nighttime.

Cunigan called a state prosecutor and submitted a sworn affidavit in support of his application for a search warrant. A state court judge issued a warrant for the search and seizure of "any and all illegally possessed controlled substances including marijuana, both growing and processed, and any drug paraphernalia, also any and all illegally possessed prescription drugs." Joint Appendix ("J.A.") at 584 (1st Warrant).

At 11:19 p.m., Cunigan returned to the residence with other officers and an agent from the Drug Enforcement Agency to execute the search warrant, conducting a fourth search of the residence. The officers forcibly opened locked doors in the basement apartment, finding and seizing 393 marijuana plants and various pieces of growing equipment. In addition to the drugs and drug paraphernalia, the officers indicated that they seized "assorted paper records, receipts, bank records, insurance records, tax papers, personal ledgers, jewelry." J.A. at 585 (1st Warrant) (notes on warrant).

On March 15, 1994, Detective John Telek ("Telek") signed an affidavit in support of a second warrant to search the house and two vehicles found there. According to the warrant, Telek was permitted to search for the following items:

1. Any and all illegally possessed controlled substances to wit: Marijuana and any drug paraphernalia;

2. Any and all tax records or documents reflecting the income and/or sources of income of any of the above named persons[;]

3. Any documents reflecting the purchase of drug paraphernalia including the receipts for grow lights, potting soil, fertilizer, plant pots, fans[.]

J.A. at 589 (2d Warrant). Shamaeizadeh claims that this search warrant was drafted in an attempt to cover up the illegal seizure of items during the execution of the first warrant.

Upon the recommendation of the local Commonwealth Attorney and a representative of the United States Attorney for the Eastern District of Kentucky, the Richmond Police Department turned over the evidence and prosecution of this matter to the United States government. Shamaeizadeh, Reed, and Ford were arrested and indicted for federal drug-law violations under 21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. §§ 2 and 924(c)(1). Shamaeizadeh was also charged with renting the basement apartment for the purpose of unlawfully manufacturing, storing, or distributing marijuana under 21 U.S.C. § 856. None of the officers who searched Shamaeizadeh's residence testified before the grand jury.

Shamaeizadeh, Reed, and Ford moved to suppress the evidence seized pursuant to the first warrant. At the suppression hearing, Cunigan and Wiles, the only officers directly involved in Shamaeizadeh's criminal prosecution, testified. The magistrate judge concluded that Wiles's initial warrantless search of the residence was constitutional due to exigent circumstances, but found the second and third warrantless searches unconstitutional. The magistrate judge recommended that Cunigan's affidavit be redacted to reflect only the information obtained as a result of the initial search and through conversations with Schmitt. He then concluded that the redacted affidavit provided probable cause to search the main floor of the residence for illegal drug activity, but not probable cause to support a warrant for the basement. The magistrate judge therefore recommended suppressing the evidence seized from the basement, and the district court adopted this recommendation. The government appealed the district court's decision to suppress the evidence, and the Sixth

Circuit affirmed. *United States v. Shamaeizadeh,* 80 F.3d 1131 (6th Cir. 1996). The government then moved to dismiss the indictment, and the district court granted the motion.

Shamaeizadeh brought a § 1983 action against the City of Richmond, the Richmond Police Department, and five individual police officers -- Cunigan, Wiles, Manley, Telek, and Grant -- for damages caused by the illegal searches and Shamaeizadeh's subsequent prosecution. Shamaeizadeh also claimed that he was maliciously prosecuted in violation of state law. The officers filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

The district court ruled that Shamaeizadeh's claims relating to the alleged illegal search, seizure, and Shamaeizadeh's subsequent arrest were time barred. The district court also dismissed Shamaeizadeh's malicious prosecution claim, finding that the officers were entitled to qualified immunity. Finally, the district court declined to exercise pendent jurisdiction over the state law claims, dismissing them.

Shamaeizadeh appealed the district court's dismissal of his action. The Sixth Circuit reversed, and the Supreme Court denied certiorari. *Shamaeizadeh v. Cunigan,* 182 F.3d 391 (6th Cir.), *cert. denied*, 528 U.S. 1021, 120 S. Ct. 531, 145 L. Ed. 2d 412 (1999). When the case returned to the district court for discovery, the district court agreed to exercise pendent jurisdiction over the state law claims.

The officers filed a motion for judgment on the pleadings or for summary judgment. The district court considered Shamaeizadeh's "(1) 42 U.S.C. § 1983 claim based upon an illegal search, seizure and wrongful arrest; (2) 42 U.S.C. § 1983 claim for 'misrepresentation' and (3) . . . state law malicious prosecution claim." J.A. at 396 (Op. & Order). The

district court entered summary judgment for the defendants and dismissed Shamaeizadeh's claims with prejudice.

Shamaeizadeh timely appealed from the district court's order entering final judgment in favor of the defendants.

II. ANALYSIS

We review a district court's order granting summary judgment de novo. *Rannals v. Diamond Jo Casino,* 265 F.3d 442, 447 (6th Cir. 2001), *cert. denied*, 534 U.S. 1132, 122 S. Ct. 1074, 151 L. Ed. 2d 976 (2002). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). A dispute over a material fact is not considered "genuine" unless a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505,91 L. Ed. 2d 202 (1986) (quotation omitted). In deciding whether summary judgment was appropriate, we view all evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

A. Shamaeizadeh's Standing to Challenge the Basement Searches

The district court granted summary judgment to the officers on Shamaeizadeh's § 1983 claims that the basement was illegally searched, reasoning that Shamaeizadeh did not have a reasonable expectation of privacy in the basement apartment.[2]

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[2] In Shamaeizadeh's federal criminal case, the district court had concluded that Shamaeizadeh did not have any expectation of

Shamaeizadeh contends that he has standing to challenge the basement searches because he owned the basement and lived in close proximity to it. He does not maintain, however, that the basement was part of his residence.

To assert a Fourth Amendment violation, Shamaeizadeh must show that the government's action in some way invaded his own reasonable expectation of privacy. *United States v. Knotts,* 460 U.S. 276, 281, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983); *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). We apply a two-part test to determine whether Shamaeizadeh had a reasonable expectation of privacy, asking (1) whether Shamaeizadeh "manifest[ed] a subjective expectation of privacy in the premises searched"; and (2) whether society is "prepared to recognize that expectation as legitimate." *Bonds v. Cox,* 20 F.3d 697, 701 (6th Cir. 1994).

Assuming that Shamaeizadeh manifested a subjective expectation of privacy because he owned the basement and lived in close proximity to it, society is not prepared to recognize that expectation as legitimate. Although Shamaeizadeh owned the entire residence, ownership alone does not justify a reasonable expectation of privacy. The Supreme Court has consistently held that privacy interests are not coterminous with one's property rights. *United States v. Salvucci,* 448 U.S. 83, 91, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980) ("[W]hile property ownership is clearly a factor to be considered in determining whether an individual's Fourth

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privacy in the basement apartment and therefore lacked standing to bring a motion to suppress evidence seized therein. Shamaeizadeh sought to appeal this determination, but the Sixth Circuit dismissed the appeal for lack of jurisdiction. *United States v. Shameizadeh* [sic], 41 F.3d 266, 267 (6th Cir. 1994).

Amendment rights have been violated, property rights are neither the beginning nor the end of this Court's inquiry." (citation omitted)). In deciding whether someone has a reasonable expectation of privacy for Fourth Amendment purposes, courts consider a number of factors, including

> the person's proprietary or possessory interest in the place to be searched or item to be seized . . . . whether the defendant has the right to exclude others from the place in question; whether he had taken normal precautions to maintain his privacy; whether he has exhibited a subjective expectation that the area would remain free from governmental intrusion; and whether he was legitimately on the premises.

United States v. King, 227 F.3d 732, 744 (6th Cir. 2000); *see Hardwig v. United States,* 23 F.2d 922, 922 (6th Cir. 1928) (concluding that a lessee who sublets part of a building to a sublessee personally has "no right to object to evidence of what was found or done there").

Although Shamaeizadeh had a proprietary interest in the basement of the residence, he has consistently stated that the basement apartment was maintained as a separate residence, indicating that he was not in possession of the basement. When the officers searched the residence, it was evident that the door between the main level and the basement had been forced open. Moreover, Wiles's testimony at the suppression hearing indicates that even he recognized that the basement "was an apartment" and that, in light of Schmitt's explanations, "he understood the residence at 121 Millstone to consist of a house with an apartment underneath it." J.A. at 37 (Magistrate Judge's Proposed Findings of Fact and Recommendation)

(quotations and brackets omitted).[3] Therefore, Reed and Ford had the right to exclude others from the basement, but Shamaeizadeh did not. Shamaeizadeh took no precautions to maintain any privacy interest he might have had in the basement when he leased the basement to Reed and Ford and permitted them to occupy it as a separate residence. Moreover, Shamaeizadeh did not exhibit "a subjective expectation that the area would remain free from governmental intrusion." *King*, 227 F.3d at 744. Therefore, in light of these factors, Shamaeizadeh had no expectation of privacy in the basement of the residence; any expectation of privacy in the basement belonged solely to the lessees, Ford and Reed.

Because Shamaeizadeh had no reasonable expectation of privacy in the basement apartment and has no standing to claim a constitutional violation on behalf of either lessee, the district court did not err by granting summary judgment to the defendants insofar as Shamaeizadeh's claims seek damages for the basement searches. Therefore, we will consider Shamaeizadeh's other claims only in the context of the searches of the main floor of the residence.

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[3] The Magistrate Judge's Proposed Findings of Fact and Recommendation were made in the context of a suppression hearing during the federal prosecution of Shamaeizadeh, Reed, and Ford. Although two state officers testified at the suppression hearing, they were not parties to the federal criminal action. Moreover, although Shamaeizadeh was a defendant in the criminal action, the district judge determined that he lacked standing to seek the suppression of evidence. Because neither the state officials nor Shamaeizadeh were parties to the suppression hearing, it would ordinarily be inappropriate for this court to consider the magistrate judge's factual findings in this civil action. However, because both parties rely on the magistrate judge's findings in their briefs before this court and neither party contests these findings, we may properly consider them.

B. Qualified Immunity

According to the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). We undertake a three-step analysis of qualified immunity claims:

> First, we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred. Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Third, we determine whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

Feathers v. Aey, 319 F.3d 843, 848 (6th Cir. 2003) (quotation omitted); *see also Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999) (en banc).

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *see Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992). In other words, the unlawfulness must be apparent under preexisting law. The unlawfulness of an action may be apparent in light of "direct holdings, from specific

examples described as prohibited, or from the general reasoning that a court employs." *Feathers,* 319 F.3d at 848. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer,* 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *see Russo,* 953 F.2d at 1042 ("[I]t need not be the case that the very action in question has previously been held unlawful." (quotation omitted)).

1. The Second and Third Warrantless Searches

Shamaeizadeh argues that the district court erred by dismissing his § 1983 claim that the second and third searches of the main floor of the residence were unconstitutional on the ground that these searches "were of no consequence and at best constitute harmless error." J.A. at 405 (Op. & Order). The district court did not determine the constitutionality of the searches, instead reasoning that Shamaeizadeh failed to allege an injury for § 1983 purposes because the information gathered during the second and third searches was purged from the affidavit supporting the subsequent search warrants. But Shamaeizadeh did allege an injury with respect to the second and third searches: a § 1983 plaintiff can seek damages for pain, suffering, embarrassment, and humiliation. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) (explaining that a § 1983 plaintiff can seek compensatory damages for "impairment of reputation . . ., personal humiliation, and mental anguish and suffering" (quotation omitted)). Therefore, we must consider whether the officers are entitled to summary judgment on this part of Shamaeizadeh's § 1983 action on alternative grounds. Because the second and third searches were unconstitutional and the officers were not entitled to qualified immunity with respect to this conduct, we reverse the district court's grant of summary judgment on this issue.

The officers contend that the second and third searches were constitutional because either (1) Schmitt gave continuing consent for the searches, (2) exigent circumstances were present, or (3) the plain view doctrine applied. If any of these exceptions to the Fourth Amendment warrant requirement apply, the searches were constitutional.[4]

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[4] The district court below and the district court during the criminal proceedings concluded that the second and third searches were unconstitutional. However, Shamaeizadeh cannot collaterally estop the officers from relitigating this issue because the officers — "the party against whom estoppel is sought" — did not have "a full and fair opportunity to litigate the issue" during the suppression hearing. *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987). Although two defendants in the current action — Wiles and Cunigan — testified at the suppression hearing, neither they nor the other defendants in the present action had an opportunity fully and fairly to litigate the issue. Furthermore, the officers, the Richmond Police Department, and the City of Richmond are not in privity with the federal government, which was a party to the first action. *See United States v. White,* 19 F.3d 20, 1994 WL 70855, at **10 (6th Cir. 1994) ("[I]t would be a stretch to say that federal prosecutors are in privity with an exclusively state prosecution."), *cert. denied*, 513 U.S. 861, 513 U.S. 949 (1994); *cf. Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 84 L. Ed. 1263, 60 S. Ct. 907 (1940) ("There is privity between officers of the same government."). The fact that the federal government relied on evidence from state officers in a federal proceeding does not bind the officers to the outcome of that proceeding. *See United States v. Perchitti*, 955 F.2d 674, 677 (11th Cir. 1992) (explaining that cooperation between federal and state authorities in the investigation of a defendant does not necessarily establish privity between the federal and state governments); *see also Ferina v. United States,* 340 F.2d 837, 840 (8th Cir.) (merely using the fruits of federal investigations in state proceedings "does not infect the separate sovereignty of that prosecution, nor bind the federal government in any manner to the issues so resolved by the state judgment"), *cert.*

a. Consent

Consent from an individual whose property is to be searched or from a third party who possesses common authority over the premises validates a search that would otherwise be considered unreasonable and unconstitutional. *United States v. Matlock,* 415 U.S. 164, 94 S. Ct. 988, 171, 39 L. Ed. 2d 242 (1974). However, even when a search is authorized by consent, "the scope of the search is limited by the terms of its authorization." *Walter v. United States,* 447 U.S. 649, 656, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980). The Supreme Court has explained that "the scope of a suspect's consent under the Fourth Amendment" turns on what "the typical reasonable person [would] have understood by the exchange between the officer and the suspect[.]" *Florida v. Jimeno,* 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991). As long as an officer has an objectively reasonable belief that the search was within the course of consent, the search is valid. *Id.* But the Fourth Amendment "requires that the scope of every authorized search be particularly described." *Walter,* 447 U.S. at 657.

The officers suggest that we should conclude that Schmitt provided continuing consent which authorized all three warrantless searches.[5] The police contend that, as a historical

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denied, 381 U.S. 902, 85 S. Ct. 1446, 14 L. Ed. 2d 284 (1965).

[5] Although they did not press the issue in their brief, the officers also suggested at oral argument that all three warrantless searches were actually components of a single constitutional search. This court has recognized "that a single search warrant may authorize more than one entry into the premises identified in [a] warrant, as long as the second entry is a reasonable continuation of the original search." *United States v. Keszthelyi,* 308 F.3d 557, 568 (6th Cir.

matter, once consent is granted in Kentucky, it must be expressly revoked. Appellees' Br. at 23 (citing as support *Smith v. Commonwealth,* 197 Ky. 192, 246 S.W. 449, 451 (Ky. 1923), which held that consent cannot be revoked once a search has begun). Some states have recognized a principle of continuing consent, which allows officers to execute subsequent, closely-related searches in the absence of an objection because the absence of objection permits an inference that the initial consent continued. *See, e.g., State v. Luther,* 63 Ore. App. 86, 663 P.2d 1261, 1263 (Or. Ct. App. 1983), *aff'd,* 296 Ore. 1, 672 P.2d 691 (Or. 1983); *Phillips v. State,* 625 P.2d 816, 818 (Alaska 1980). But even if we were to recognize a principle of continuing consent that might extend throughout three separate searches closely related in time and purpose, the second and third searches exceeded the scope of Schmitt's initial consent.

2002). Although we have not previously applied *Keszthelyi* in the context of a search justified on grounds other than a warrant, it is clear that regardless of the source of authority for a search, a search ends when subsequent entries into the identified premises are not reasonable continuations of the original search. Thus, if the first search was constitutional because Schmitt consented to it, the search ended when it exceeded the scope of her consent to the officer's search for a possible intruder. Similarly, if the first search was constitutional because there were exigent circumstances, *see infra,* that search ended when the officers began to search for drugs rather than a burglar. *See Mincey v. Arizona,* 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) (explaining that a search justified by exigent circumstances is strictly circumscribed by the emergency that justifies it). The fact that Wiles called in additional officers with drug experience suggests that the searches for drugs and drug paraphernalia were new searches, rather than reasonable continuations of the constitutional search for a burglar.

The officers could not have had an objectively reasonable belief that the second and third searches were within the course of Schmitt's consent. Schmitt clearly consented to Wiles's first search of the premises when she asked him to search for an intruder. But the officers do not assert that Schmitt explicitly consented to the second or third search. In fact, they admit that they did not expressly request her consent when additional officers arrived to search the residence and that they do not recall Schmitt expressly articulating any such consent of her own volition. Schmitt's request that Wiles search the residence for a burglar does not objectively indicate consent for Wiles to call in a supervisor and execute a second search or for Wiles and a supervisor to call in officers with more experience in detecting drugs to execute a third search. Because the second and third searches exceeded the scope of Schmitt's consent, they were unconstitutional.

b. Exigent Circumstances

The officers also maintain that the second and third searches were constitutional because they were executed under exigent circumstances. Warrantless entries are permitted under exigent circumstances, which "exist where there are real immediate and serious consequences that would certainly occur were a police officer to postpone action to get a warrant." *Ewolski v. City of Brunswick,* 287 F.3d 492, 501 (6th Cir. 2002) (quotations and brackets omitted). As with the consent exception to the warrant requirement, we measure exigent circumstances by a standard of objective reasonableness, asking "whether the facts are such that an objectively reasonable officer confronted with the same circumstances could reasonably believe that exigent circumstances existed." *Id.* Exigent circumstances typically exist in one of three situations: officers are in hot pursuit of a suspect, a suspect represents an immediate threat to officers and the public, or

"immediate police action [is] necessary to prevent the destruction of vital evidence or thwart the escape of known criminals." *Hancock v. Dodson,* 958 F.2d 1367, 1375 (6th Cir. 1992).

No one contests that Wiles's initial search of the residence was conducted in the face of exigent circumstances. Wiles was dispatched to investigate a possible burglary and believed the burglar might still be present in the residence. The officers now claim that the second and third searches were necessary because the burglar may have been hiding behind locked doors. However, at the suppression hearing in the federal criminal trial, Wiles testified "that he called for backup not because he suspected that a burglary had occurred or because he suspected that a burglar may still be present in the residence, but because when he walked into the downstairs portion of the residence he smelled what he suspected to be growing marijuana." J.A. at 50 (Magistrate Judge's Proposed Findings of Fact and Recommendation). Moreover, Wiles's present claim that he sought backup for the purpose of looking for a possible intruder is inconsistent with the officers' decision to search the entire residence again, rather than simply to investigate the locked rooms that Wiles had been unable to enter. Most importantly, the fact that the officers called in narcotics experts to conduct the third search drastically undercuts the officers' claim that the possible presence of an intruder created exigent circumstances justifying a third search. These facts are such that an objectively reasonable officer could not have reasonably believed that there were exigent circumstances.

The officers' suspicion that marijuana was being grown in the residence also failed to create new exigent circumstances justifying a search. During the second and third searches, the officers were not in hot pursuit of a suspect, threatened by a suspect, or attempting to thwart the escape of a known

criminal. The only arguable exigent circumstance in this context was a possible need to prevent the destruction of vital evidence. But the officers cannot argue that they were attempting to prevent the destruction of vital evidence because they were not even certain of what evidence they were searching for at the time — the second and third searches were fishing expeditions for evidence of a drug crime. Thus, new exigencies did not arise to justify the second and third searches.

Because the exigencies justifying the first search did not continue and because new exigencies did not arise to justify the second and third searches, we cannot conclude that exigent circumstances justified the otherwise unconstitutional searches.

c. Plain View

Finally, the officers maintain that their warrantless second and third searches of the residence were justified by the plain view doctrine because drug paraphernalia was in plain view during the second and third searches. To invoke the plain view doctrine, evidence must be "(1) in plain view; (2) of a character that is immediately incriminating; (3) viewed by an officer lawfully located in a place from where the object can be seen; and (4) seized by an officer who has a lawful right of access to the object itself." *United States v. Roark*, 36 F.3d 14, 18 (6th Cir. 1994). Although the plain view doctrine would likely have justified Wiles's seizure of immediately incriminating drug paraphernalia during the first search, it clearly cannot justify the second and third searches. For the exception to apply, an officer seizing an item in plain view must be "lawfully located." Because the officers were not lawfully in the residence during the second and third searches, the plain view doctrine cannot serve to constitutionalize an otherwise improper search. We therefore conclude that the officers would violate Shamaeizadeh's constitutional rights by seizing items

in plain view while the officers were unlawfully present in Shamaeizadeh's residence.

Because none of the three asserted exceptions apply, we conclude that the officers are not entitled to summary judgment on grounds that the second and third searches were constitutional. In fact, there is no genuine issue of material fact about the constitutionality of the second and third searches; even when viewed in the light most favorable to the officers, the facts indicate that these searches were unconstitutional.

Furthermore, the officers are not entitled to qualified immunity with respect to this aspect of Shamaeizadeh's § 1983 claim because their unconstitutional conduct "involved a clearly established constitutional right of which a reasonable person would have known." *Feathers,* 319 F.3d at 848. At the time of the searches, the Supreme Court had clearly stated that the justification for a search determines its appropriate scope:

> The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all . . . . [E]vidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation.

Terry v. Ohio, 392 U.S. 1, 28-29, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A reasonable person would have known that the "scope of [a] search is limited by the terms of its authorization," *Walter,* 447 U.S. at 657. Moreover, it was clear that "while exigent circumstances may justify police conduct that would otherwise be unreasonable if undertaken without a warrant, such conduct must be strictly circumscribed by the exigencies which justify its initiation," *Segura v. United States,* 468 U.S. 796, 823, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)

(quotation omitted). A reasonable officer therefore could not have objectively considered the consent or exigencies purportedly justifying the warrantless search to have extended beyond Wiles's initial search of the residence. Finally, because it was also clearly established that the plain view exception cannot serve to justify an otherwise unconstitutional search, we must conclude that the officers' second and third warrantless searches violated a clearly established constitutional right of which a reasonable person would have known. Shamaeizadeh "has offered sufficient evidence to indicate that what the official[s] allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Feathers*, 319 F.3d at 848.

Therefore, we reverse the district court's grant of summary judgment on this issue, and we conclude that the officers are not entitled to summary judgment on Shamaeizadeh's § 1983 claims pertaining to the second and third searches either on the merits or on grounds of qualified immunity. In fact, we conclude that the second and third searches were unconstitutional.

2. Probable Cause for the Warrants

Shamaeizadeh argues that the district court erred in concluding that Cunigan's affidavit provided probable cause for the first warrant to search the main floor. The district court concluded that there was sufficient legally acquired information in Cunigan's redacted affidavit to establish probable cause. In doing so, the district court ignored the Sixth Circuit's observation in dicta during review of the earlier criminal proceedings that "[c]uriously, the magistrate never recommended redacting Cunigan's entire statement from the affidavit, even though it appears to be the fruit of an illegal search." *United States v. Shamaeizadeh*, 80 F.3d 1131, 1137

n.3 (6th Cir. 1996). Although the Sixth Circuit has previously discussed this issue, a discussion occurring in the context of a federal criminal case is not binding on the state officers who are parties to this civil action. Nevertheless, Shamaeizadeh urges us to adopt the view articulated by the Sixth Circuit in the prior criminal appeal and argues that all evidence in Cunigan's affidavit was poisonous fruit of the unconstitutional second and third searches, such that the entire affidavit should be rejected.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. An affidavit on which a search warrant is issued need not reflect direct personal observations of the affiant if the hearsay information is derived from a credible source. *United States v. Ventresca,* 380 U.S. 102, 108, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965). When deciding whether to issue a search warrant, a magistrate simply must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Therefore, we must determine whether Cunigan's affidavit established a fair probability that evidence of a crime would be found at the residence.

Cunigan's affidavit set forth the following information about Shamaeizadeh's suspected drug activity:

> On the 14th[ ]day of March, 1994, at approximately 8:34, the Richmond Police Department received a call

> [from] Teresa Schmidt [sic] of 121 Millstone Drive, and Ms. Schmidt [sic] reported that there had been a burglary at her residence. Officer Mark Wiles responded to the alleged burglary and upon entering the residence and beginning the investigation Officer Wiles along with Sgt. Sam Manley and Asst. Chief Wayne Grant observed numerous items of drug paraphernalia, partially smoked marijuana cigarettes, plastic bag containing several different types of what appeared to be prescription pills and plastic bag containing what readily appeared to be suspected marijuana. At this time I was contacted and I went to the residence where I also observed the same items.
>
> While in the residence, I detected a strong odor of growing marijuana both upstairs and downstairs. Several of the rooms in the residence were locked and we were unable to look inside them.
>
> According to Schmidt [sic], some of the other occupants of the house are growing marijuana inside the house.
>
> From under the door of one of the locked rooms, I could see a strong florescent [sic] light glow.

J.A. at 587 (Cunigan Aff.). We cannot consider some of the information included in Cunigan's affidavit, however, because "the exclusionary rule prohibits introduction into evidence. . . of testimony concerning knowledge acquired during an unlawful search." *Murray v. United States*, 487 U.S. 533, 536, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

Although the second and third searches were unconstitutional, the searches of the basement violated only

Reed's and Ford's constitutional rights. "[A] court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights," meaning that the challenged conduct invaded the defendant's expectation of privacy. *United States v. Payner*, 447 U.S. 727, 731, 100 S. Ct. 2439, 65 L. Ed. 2d 468 (1980) (*citing Rakas*, 439 U.S. at 138). In this context, the evidence seized from the basement during the second and third searches of the basement did not invade Shamaeizadeh's expectation of privacy. Therefore, in determining whether probable cause was present for issuance of the first search warrant, we need not redact Cunigan's affidavit to exclude all evidence that was seized during the second and third searches in violation of someone's constitutional rights. Rather, we exclude from the affidavit only evidence gathered from the main floor of the house in violation of *Shamaeizadeh's* constitutional rights.

Most of the statements in Cunigan's affidavit rely on evidence seized from the basement of the residence, and need not be redacted in Shamaeizadeh's case. Therefore, in evaluating the existence of probable cause for the issuance of the first search warrant, we can consider Cunigan's statements about drugs and drug paraphernalia in the basement and the strong fluorescent-light glow under one of the locked doors in the basement. As the district court noted, Cunigan also was entitled to rely on "Schmitt's statement that some of the other occupants of the house were growing marijuana." J.A. at 403 (Op. & Order). Cunigan could also rely on Wiles's observations of the smell in the basement for the purpose of establishing probable cause, but we must redact from Cunigan's affidavit any suggestion that Cunigan detected a strong scent of marijuana on the main floor of the residence because the second and third searches of the main floor were unconstitutional. Upon considering this evidence, we conclude

that the information remaining in the redacted affidavit did establish a "fair probability that contraband or evidence of a crime" would be found in the basement residence. *Gates*, 462 U.S. at 238.

Similarly, the evidence in Telek's affidavit that was filed in support of the second warrant established a "fair probability that contraband or evidence of a crime" would be found in the basement residence. *Gates*, 462 U.S. at 238. Telek's affidavit was identical to Cunigan's, with the exception of one additional paragraph that explained,

> Based on the forgoing [sic] information a Search Warrant was secured for the premises and over 390 marijuana plants were recovered from the residence. According to the Chief of Police, also found during the search, was a receipt reflecting that Ali [Shamaeizadeh] purchased some lights and a blower. From my experience, these types of items would commonly be used in the type of growing operation as was discovered here on Millstone Drive.

J.A. at 591 (Telek Aff.). In addition to the evidence excluded from Cunigan's affidavit, Shamaeizadeh's receipt for the purchase of lights and a blower should be excluded from Telek's affidavit because it is unclear whether the officers seized this evidence from the basement or the main floor of the residence. The 390 marijuana plants were seized from the basement, so Shamaeizadeh does not have standing to challenge their inclusion in the affidavit. As with the first warrant, we conclude that the evidence in Telek's redacted affidavit was sufficient to provide probable cause for a second warrant, at least with respect to the basement.

Although the evidence discovered in the basement established probable cause for the first and second warrants to search that portion of the residence, the evidence discovered in the separate basement apartment does not in itself establish probable cause to search the entire house. "[W]hen the structure under suspicion is divided into more than one occupancy unit, probable cause must exist for each unit to be searched." *United States v. Whitney*, 633 F.2d 902, 907 (9th Cir. 1980), *cert. denied*, 450 U.S. 1004, 101 S. Ct. 1717, 68 L. Ed. 2d 208 (1981). Neither redacted affidavit establishes probable cause that evidence of a crime would be found "in [the] particular place" in question — the main floor of the residence. Therefore, we conclude that the officers committed a constitutional violation by searching the entire residence without probable cause to do so and that this right was clearly established.

Even though the officers violated Shamaeizadeh's clearly established constitutional rights, they are nevertheless entitled to qualified immunity if Shamaeizadeh has failed to offer sufficient evidence that the officers' actions were objectively unreasonable in light of the clearly established constitutional rights. *See Feathers,* 319 F.3d at 848. We conclude that, in light of the information available to the officers at the time of the search, it was objectively reasonable for them to believe that there was not a distinct boundary between the two parts of the residence.

The officers clearly knew that two men lived in the basement apartment and that they were away on spring break. However, they also had reason to believe that all occupants of the residence moved freely between the basement apartment and the main floor. At the suppression hearing in the criminal case, Wiles testified that he discovered that the door between the two units had been kicked open. J.A. at 36 (Magistrate

Judge's Proposed Findings of Fact and Recommendation). At the same hearing, Wiles testified that Schmitt led him into the basement and explained to him that although two men lived downstairs, "They don't mind me being down here; I use the phone on occasion," suggesting that she was at liberty to move throughout the entire residence. J.A. at 37 (Magistrate Judge's Proposed Findings of Fact and Recommendation) (quotation omitted). Before Wiles even entered the basement, he observed Schmitt "exiting through the back door of the downstairs portion of the residence." J.A. at 37 (Magistrate Judge's Proposed Findings of Fact and Recommendation). According to Wiles,

> It appeared . . . that [Schmitt] had free run of the house, with the exception of the locked rooms. She had even stated that she used the phone down there often. She told me it was fine to go down there. Even as I was in the back yard searching in the brush for possible suspects, she came and got me from the downstairs door.

J.A. at 453 (Wiles Dep.). This evidence suggests that the officers reasonably could have believed that all four occupants of the residence had access to the residence in its entirety. Therefore, it was objectively reasonable for the officers to conclude that they had probable cause for a warrant to search the entire house.

Thus, the officers had probable cause for both warrants to search the basement, and, as discussed above, reasonably could have believed on the facts of this case that this established probable cause for searches of the entire residence in light of the information available to them at the time. We therefore conclude that the officers are entitled to qualified immunity with respect to Shamaeizadeh's § 1983 claim that the officers

lacked probable cause for the first and second warrants, and affirm the district court's grant of summary judgment with respect to these claims.

3. Wrongful Seizure During Execution of the First Warrant

Shamaeizadeh argues that the district court erred by concluding that the officers did not unconstitutionally seize items outside the scope of the first warrant. During the criminal case, the district court adopted the magistrate judge's finding that the officers' execution of the March 14, 1994, warrant went far beyond its terms when the officers seized paper records and receipts. The warrant authorized the officers to search for "[a]ny and all illegally possessed controlled substances including marijuana, both growing and processed, and any drug paraphernalia, also any and all illegally possessed prescription drugs." J.A. at 584 (1st Warrant). In addition to seizing these items, the officers also seized numerous documents, records, and pieces of jewelry.

Seizing items beyond the scope of a warrant's authorization violates the Fourth Amendment rights of the subject of a search. *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976); *see Brindley v. Best*, 192 F.3d 525, 533 (6th Cir. 1999) (reversing a district court's grant of summary judgment because "no reasonable officer in the defendants' position could have believed that certain seized items were within the scope of the warrant or evidence of a crime"). Generally, officers are obligated to secure an additional warrant if they want to seize things not included in a warrant. However, where a warrant justifies an officer's initial intrusion and the officer "in the course of the search come[s] across some other article of incriminating character," the plain view doctrine may supplement the prior justification

and permit the warrantless seizure. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022 (1971), 29 L. Ed. 2d 564.

Under the plain view doctrine, officers may seize items not within the scope of the warrant where the evidence is "(1) in plain view; (2) of a character that is immediately incriminating; (3) viewed by an officer lawfully located in a place from where the object can be seen; and (4) seized by an officer who has a lawful right of access to the object itself." *Roark*, 36 F.3d at 18. Assuming that the officers were executing a valid warrant and thus were legally in a place where they saw the jewelry and documents in plain view, the seizure of these items during the execution of the first warrant was nevertheless unconstitutional because their incriminating character is not immediately apparent as an objective matter.

In determining whether probable cause is immediately apparent upon viewing an object, this court has considered three factors:

> (1) the nexus between the seized object and the items particularized in the warrant; (2) whether the intrinsic nature or appearance of the seized object gives probable cause to associate it with criminal activity; and (3) whether probable cause is the direct result of the executing officer's instantaneous sensory perceptions.

United States v. Calloway, 116 F.3d 1129, 1133 (6th Cir.), *cert. denied*, 522 U.S. 925, 118 S. Ct. 324, 139 L. Ed. 2d 250 (1997). "[A]ssuming that there is probable cause to associate the property with criminal activity," however, a plain view seizure is "presumptively reasonable" and does not require an "unduly high degree of certainty." *Texas v. Brown*, 460 U.S.

730, 741-42, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (quotation and emphasis omitted).

The officers argue that probable cause to seize the jewelry was immediately apparent because they reasonably believed that the jewelry was derived from the proceeds of drug-related crimes. Although an officer need not be sure an item in plain view is contraband in order to seize it, "when an item appears suspicious to an officer but further investigation is required to establish probable cause as to its association with criminal activity, the item is not immediately incriminating." *United States v. McLevain*, 310 F.3d 434, 443 (6th Cir. 2002) (quotation omitted). Nothing about the intrinsic nature of the jewelry gave the officers cause to associate it with the drug activity under investigation. *Calloway*, 116 F.3d at 1133. Because further investigation would be necessary to establish probable cause of the existence of a relationship between the jewelry and illegal drugs or drug paraphernalia, we conclude that there was no clear nexus between the jewelry seized "and the items particularized in the search warrant." *United States v. Beal*, 810 F.2d 574, 576 (6th Cir. 1987).

The officers also maintain that probable cause to seize the documents was immediately apparent because the documents suggested that Shamaeizadeh had multiple identities and was forging instruments in violation of Kentucky law. With respect to the documents, reasonable officers could not believe that probable cause was apparent as a "direct result of the officer's instantaneous sensory perception of the object." *Id.* at 577 (quotation omitted). To have probable cause for associating the seized documents with possible criminal activity, the officers would have required far more than an instant to conclude that any of the documents implicated criminal activity. The plain view exception therefore does not apply to the seizure of either the jewelry or the documents.

The officers violated a clearly established constitutional right of which reasonable persons would have known — a right to be free of seizures beyond the scope of a warrant, in the absence of an exception to the warrant requirement such as the plain view doctrine. Moreover, the undisputed evidence indicates that the officers' seizure of documents and jewelry was objectively unreasonable in light of these clearly established rights. Therefore, we conclude that the officers are not entitled to qualified immunity with respect to Shamaeizadeh's claims of wrongful seizure, and that the district court erred by granting summary judgment to the officers regarding these claims.[6]

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[6] The officers contend that Shamaeizadeh's § 1983 seizure claim should be dismissed as untimely. They argue that while we previously held that § 1983 claims do not accrue until termination of the criminal proceedings in the § 1983 plaintiff's favor, such that the one-year § 1983 statute of limitations does not start to run until that point, that holding does not apply here because Shamaeizadeh's seizure claim does not relate to the criminal proceedings. *See Shamaeizadeh*, 182 F.3d at 399. It is true that the indictment did not charge Shamaeizadeh with crimes regarding stolen jewelry or forged documents, but the items were seized because of their potential relationship to the drug crimes. Even though the indictment only mentioned drug crimes stemming from the apartment below, it would have been impossible to conclude during the course of Shamaeizadeh's criminal proceeding that the seized jewelry and papers would not have been used as evidence of that alleged illegality. Shamaeizadeh would not have known when to bring the § 1983 suit before and during the criminal drug trial, because the jewelry could have been admitted as evidence up to the last day of the trial. As we previously stated, "[t]o require a defendant in a criminal proceeding to file a civil action raising *any* potential § 1983 claims within one year of any alleged illegal searches or other alleged violations of constitutional rights, claims which the federal court must then abstain from resolving until the disposition of the criminal proceedings, would misdirect the criminal defendant." *Id.*

C. Misrepresentation & False Arrest

Shamaeizadeh explicitly states that his misrepresentation and false arrest claims hinge on this court finding that Shamaeizadeh has standing to challenge the searches of the basement. In fact, his entire argument with respect to these two claims is as follows:

> **Misrepresentation and False Arrest**
>
> The Court dismissed Appellant[']s constitutional claim for misrepresentation by Appellees on the affidavit for a warrant by failing to put that the house consisted of two residences. The Court felt that there was no causal connection between the warrant search and the misrepresentation. Secondly, the Court felt that Appellant had no claim for false arrest under § 1983 because, again, there was no causal connection between the arrest and the improper search because Appellant had no standing to complain about the basement search.
>
> However, if Appellant has standing, as argued above, to the basement search then the Court was in error concerning the issues and must be reversed.

Shamaeizadeh Br. at 23-24. Because we conclude that Shamaeizadeh does not have standing to contest the basement searches, we need not address his claims of misrepresentation and false arrest.

(emphasis added). The jewelry and the papers are still *related* enough to the drug-crimes indictment that a § 1983 suit regarding their seizure would interfere with the criminal proceedings, even though they do not provide the grounds for separate forgery or jewelry theft indictments. Thus we reject the officers' contention.

D. Malicious Prosecution

Shamaeizadeh argues that the district court erred in granting the officers summary judgment on his state law malicious prosecution claim as well. Under Kentucky law, there are six elements of malicious prosecution:

> (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Collins v. Williams, 10 S.W.3d 493, 496, 46 11 Ky. L. Summary 5 (Ky. Ct. App. 1999) (*quoting Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981)); *see McMaster v. Cabinet for Human Res.*, 824 F.2d 518, 520-21 (6th Cir. 1987).

Shamaeizadeh has failed to demonstrate the initiation or maintenance of a proceeding against the plaintiff by the defendants. *See* William L. Prosser & W. Page Keeton, *Prosser & Keeton on The Law of Torts* § 119, at 871 (5th ed. 1984). Neither the officers, the Richmond Police Department, nor the City of Richmond were involved in the prosecution of Shamaeizadeh. Although two officers testified at the suppression hearing during the criminal proceedings, Shamaeizadeh does not contest that he was indicted by a federal grand jury and none of the defendants so much as testified before the grand jury. Because the initiation or maintenance of a proceeding by the defendants is an element of malicious prosecution claims under Kentucky law, we affirm the district court's grant of summary judgment to the

defendants with respect to Shamaeizadeh's state malicious prosecution claim.

E. Municipal Liability

We construe Shamaeizadeh's § 1983 claims against the officers in their official capacity as claims against the City of Richmond. "[A] section 1983 action against a city official in his or her official capacity is treated as an action against the City entity itself." *Barber v. City of Salem*, 953 F.2d 232, 237 (6th Cir. 1992). Shamaeizadeh also states a claim against the City of Richmond for "fail[ing] or refus[ing] to supervise the training of the other Defendants or to cause them to be trained thus showing a deliberate indifference to the violation of the constitutional rights of the Plaintiff." J.A. at 28 (2d Am. Compl. ¶ 14).

To establish municipal liability pursuant to § 1983, a plaintiff must allege an unconstitutional action that "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or a "constitutional deprivation[] visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Only then can "the action of the municipality itself. . . be said to have caused the harm." *Berry v. City of Detroit*, 25 F.3d 1342, 1345 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 902, 130 L. Ed. 2d 786 (1995); *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) ("[A] municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. Respondeat superior or vicarious liability will not attach under § 1983.").

The Supreme Court has limited § 1983 actions for the inadequacy of police training, reasoning that "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Harris*, 489 U.S. at 389. There is no evidence that Richmond's police-training policies demonstrate deliberate indifference to Shamaeizadeh's constitutional rights. The City of Richmond trains officers at Eastern Kentucky University's law enforcement program and the Department of Justice's basic training program, provides specific training on the execution of searches and seizures, and provides field officers with training manuals and a manual containing a black-letter-law summary of search and seizure law. The defendant officers completed basic training and were periodically instructed on developments in criminal law. Shamaeizadeh has failed to set forth any facts showing that the City was deliberately indifferent to the training of its officers.

Furthermore, Shamaeizadeh also has failed to identify any specific custom, policy, or practice either with respect to the officers' training or with respect to the officers' searches of his residence and seizure of items therefrom. He does not allege any facts linking the conduct of individual officers to a policy of the City of Richmond or its police department. Therefore, we conclude that the district court did not err by granting the City of Richmond summary judgment with respect to this portion of Shamaeizadeh's claim.

III. CONCLUSION

For the reasons explained above, we REVERSE the district court's grant of summary judgment with respect to the second and third warrantless searches, and with respect to

Shamaeizadeh's claim that the officers exceeded the scope of the first search warrant. We AFFIRM the district court on all other grounds. We REMAND for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 97-121-KSF

[Filed September 19, 2001]

ALI SHAMAEIZADEH	)
PLAINTIFF,	)
	)
v.	)
	)
JOEL CUNIGAN, *et al.*,	)
DEFENDANTS.	)
	)

OPINION & ORDER

This matter is before the Court pursuant to defendants' motion to dismiss and motion for summary judgment. Because the parties are familiar with the facts and they are sufficiently developed in the record,[1] the Court recites them only as

[1] *See Shamaeizadeh v. Cunigan,* 182 F.3d 391 (6th Cir. 1999); this Court's underlying Opinion and Order dismissing plaintiff's claims [D.E. # 17]; *U.S.v. Shamaeizadeh,* 80 F.3d 1131 (6th Cir. 1996); and the Magistrate Judge's underlying Report and

necessary to understand the disposition. Having been fully briefed, this matter is ripe for review.

I. PROCEDURAL BACKGROUND

On April 8, 1997, Plaintiff filed this action seeking relief under 42 U.S.C. §1983 for allegations of an illegal search, wrongful arrest and malicious prosecution. In addition, Plaintiff alleged abuse of process, intentional infliction of emotional distress and failure of the City of Richmond to train or supervise its police force. On March 2, 1998, this Court granted defendants' motion to dismiss. [D.E. # 17] More specifically, the Court dismissed plaintiff's § 1983 illegal search and wrongful arrest claims as time barred because plaintiff did not bring his cause of action within one year of the illegal search or wrongful arrest. *Id.* The malicious prosecution and failure to train or supervise allegations were dismissed for failure to state a claim. *Id.* Finally, the Court declined to exercise supplemental jurisdiction over the intentional infliction of emotional distress and abuse of process state law claims. *Id.* Plaintiff appealed and the Sixth Circuit reversed holding that, for 42 U.S.C. § 1983 actions claiming alleged unconstitutional search and seizure, the statue of limitations begins to run on the date the government dismissed criminal charges against plaintiff. *Shamaeizadeh v. Cunigan,* 182 F.3d 391,398-99 (6th Cir. 1999). Because the government dismissed charges against plaintiff on April 9, 1996 and plaintiff filed his § 1983 action on April 8, 1997, the case was filed within Kentucky's one-year statute of limitations for personal injury actions. The Sixth Circuit reversed and remanded the case for further proceedings consistent with its opinion.

Recommendation (adopted by this Court) attached to plaintiff's Second Amended Complaint [D.E. # 15].

After the case was remanded, plaintiff filed a more particular statement of the complaint. [D.E. # 34] When read in conjunction with the second amended complaint, the more particular statement colorably adds the following § 1983 constitutional misrepresentation claims: (1) Joel Cunigan "drafted the incomplete Affidavit by failing to inform the Magistrate of the existence of two residences at 121 Millstone Drive and. . . misrepresented the order of the search and the order of the things found;" and (2) John Telek "misrepresented in an Affidavit that the warrant was for the seizure of property, when the property had already been illegally seized." Id.

In addition to the "new" federal claims, the remand revived plaintiff's § 1983 illegal search, seizure and wrongful arrest claims, thereby providing federal question jurisdiction upon which supplemental jurisdiction for the related state claims could be based. Therefore, the Court granted plaintiff's and defendants' motion to exercise supplemental jurisdiction over plaintiff's state law malicious prosecution claim [D.E. # 32, 33].[2] The parties did not move the Court to exercise supplemental jurisdiction over plaintiff's original intentional infliction of emotional distress and abuse of process state law claims. The failure to train or supervise allegations remain

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[2] While this Court's original order dismissing the case was on appeal, plaintiff filed a state tort law malicious prosecution claim in Madison Circuit Court but apparently did not preserve claims for intentional infliction of emotional distress or abuse of process. The Court agreed to exercise supplemental jurisdiction over the state law malicious prosecution claim in exchange for plaintiff dismissing same in Madison Circuit Court. Plaintiff's § 1983 constitutional malicious prosecution claim, to the extent alleged, was dismissed on separate and distinct grounds from the illegal search and wrongful arrest claims addressed by the Court of Appeals; therefore, it was neither revived by the remand nor the parties' motions.

dismissed for failure to state a claim pursuant to this Court's March 2, 1998 Opinion and Order.[3] [D.E. # 17]. Therefore, the claims remaining before this Court are: (1) 42 U.S.C. § 1983 claim based upon an illegal search, seizure and wrongful arrest; (2) 42 U.S.C. § 1983 claim for "misrepresentation" and (3) a state law malicious prosecution claim. Among other defenses, defendants claim entitlement to qualified immunity for each of plaintiff's constitutional claims. Each claim will be addressed in turn.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is appropriate if the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). The Court must consider all pleadings, depositions, affidavits, and admissions on file and draw reasonable inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see Smith v. Hudson,* 600 F.2d 60 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical

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[3] These were the only claims levied against the Richmond Police Department so the department is no longer a party to this suit. Viewing plaintiff's allegations in a favorable light, the City of Richmond is the probable named defendant for plaintiff's state law malicious prosecution claim. The Court will proceed on that assumption.

doubt as to the material facts." *Moore v. Phillip Morris Co.*, 8 F.3d 335, 340 (6th Cir. 1993). Conclusive allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). Ultimately, the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989) (quoting *Anderson,* 477 U.S. at 251-52).

B. Plaintiff's Claims

1. § 1983 Illegal Search, Seizure and Arrest

42 U.S.C. § 1983 provides a civil action against any person who, under color of law, subjects another to the deprivation of any Constitutional right or privilege. Based upon plaintiff's second amended complaint [D.E. # 15] and his more particular statement of the complaint [D.E. # 34], plaintiff advances a § 1983 claim for an allegedly illegal search, seizure and arrest. That claim should be further subdivided into at least three categories. First, plaintiff asserts a claim for the illegal search of his house by Officers Joel Cunigan, Sam Manley, Mark Wiles, Wayne Grant, and John Telek. Second, plaintiff alleges that the same officers also seized some of his property. Finally, plaintiff claims that he was wrongfully arrested in violation of his constitutional rights.

a. Searching the Basement

The officers involved in this case conducted five searches of plaintiff's house.[4] Plaintiff's house is divided into two separate residences. At the time of the search, plaintiff and his fiancee, Theresa Schmitt, lived on the main floor of the house in one apartment. The basement of the house was a separate apartment in which Brian Reed and Joe Ford lived. The officers searched both residences during each of the five searches.

Defendants argue that the officers' search of the basement apartment did not deprive plaintiff of any Constitutional right or privilege as required by § 1983 because Shamaeizadeh lacked standing to challenge the search. The Court agrees.

In the underlying criminal proceedings, Shamaeizadeh was denied standing to challenge the basement search. The Magistrate Judge expressly recommended that Reed's and Ford's motion to suppress all evidence seized from the downstairs portion of Millstone be granted. He also recommended that Shamaeizadeh's motion to suppress be granted and that all of the evidence seized from the *upstairs portion of the residence* except the marijuana, drug paraphernalia and illegally possessed prescription drugs obtained from the upstairs portion of the residence be excluded. Shamaeizadeh raised this issue in his objections to the Magistrate's Recommendation to suppress the evidence, noting that the Magistrate denied plaintiff standing to object to the basement search. CR94-20, D.E. # 101. In adopting the R&R, this Court adopted the Magistrate's indirect holding that

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[4] The first three searches were conducted without a warrant; however, the officers secured a warrant for the last two searches.

Shamaeizadeh did not have standing to challenge the basement apartment search.

The Sixth Circuit also acknowledged this holding during the criminal appeal. *See U.S. v. Shamaeizadeh,* 80 F.3d 1131, 1135, n.l, 1139, n.5 (6th Cir. 1996). The Sixth Circuit noted that,

> after their indictment, defendants Reed and Ford moved to suppress the evidence seized pursuant to the March 14, 1994 warrant. The district court denied Shamaeizadeh standing to participate in the motion to suppress because he had no reasonable expectation of privacy with regard to the basement floor of Millstone, where the inculpatory contraband was found.

Id. Furthermore, Shamaeizadeh appealed this Court's denial of standing, but the Sixth Circuit dismissed the appeal for lack of appellate jurisdiction. *See United States v. Shameizadeh* [sic], 41 F.3d 266, 267 (6th Cir. 1994) ("defendants may raise as part of the government's appeal any alternative arguments which would have supported the order of suppression, they may not assert those arguments as part of separate appeals or raise any arguments as to evidence not ordered suppressed by the district court.") The government later challenged the Magistrate's conclusion that the redacted affidavit did not provide sufficient probable cause to search the basement apartment.[5] The Court of Appeals affirmed this Court's decision to suppress the evidence found in the basement apartment as to Ford and Reed only. Subsequently, the government elected to dismiss the case

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[5] The Sixth Circuit did not address the Magistrate's probable cause findings regarding the upper floor of Millstone because they were not at issue on appeal. *U.S.v. Shamaeizadeh,* 80 F.3d at 1138, n.4.

as against *all defendants* even though the marijuana found in the basement was only suppressed as to Ford and Reed -- this Court obliged. CR94-20, D.E. ## 148, 149. Shamaeizadeh never re-raised the standing issue. Based upon this review of the criminal record, the Court's holding that Shamaeizadeh lacked standing to challenge the basement search remains firm, and for the reasons explained below, the Court stands by its holding.

The United States Supreme Court has outlined the requirements for standing to challenge a search:

> The touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States,* 389 U.S. 347, 360 (1967) (Harlan, J., concurring). *Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? *See Smith v. Maryland,* 442 U.S. 735, 740 (1979).

California v. Ciraolo, 476 U.S. 207, 211 (1986). One wishing to object to an unlawful search must demonstrate a violation of his or her *own* reasonable privacy expectations. *See Rakas v. Illinois,* 439 U.S. 128 (1978). The Fourth Amendment right to be free from unlawful searches and seizures can not be asserted vicariously. Charles H. Whitebread and Christopher Slobogin, *Criminal Procedure: An Analysis of Case and Concepts,* §4.04 (3rd. Ed. 1993).

Throughout the record, plaintiff openly admits that the house was divided into two separate apartments. In fact, one of his primary claims against Officer Cunigan is that, when

securing a warrant, the officer failed to inform the magistrate that 121 Millstone was divided into two residences. [D.E. # 34]. In further support that the house was divided into two residences, the door separating the upstairs apartment from the basement apartment had been forced open. Ford and Reed locked their bedrooms in the basement apartment, where the officers discovered the marijuana, and the plaintiff's fiancee did not have keys to open those doors. Nonetheless, plaintiff contends that because he owned the entire house, he had an expectation of privacy in the basement apartment.

While property ownership should be considered in determining whether plaintiff's Constitutional rights have been violated, the United States Supreme Court frequently has acknowledged that privacy interests are not coterminous with property rights. *See U.S.v. Salvucci,* 448 U.S. 83, 91 (1980). Plaintiff may have a subjective expectation of privacy in the basement apartment, but the Court finds that expectation unreasonable. A property owner relinquishes a certain amount of control over his property, including the right to exclude others, when he leases that property to a tenant. Without that basic property interest, a landlord does not have a reasonable expectation of privacy in his tenant's residence, be it an apartment or a room in a rooming house. *See, e.g. Hardwig v. U.S.*, 23 F.2d 922 (6th Cir. 1928); *c.f.*, *Rakas*, 439 U.S. at 144 n. 12 ("one of the main rights attaching to property is the right to exclude others and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.") (citation omitted). The reasonable expectation of privacy undoubtedly transfers to the individual with a present possessory leasehold interest. To hold otherwise would afford plaintiff a privacy interest beyond the scope envisioned by *Katz* and its progeny.

If plaintiff had no reasonable expectation of privacy in the basement apartment or the bedrooms therein, then the officers did not violate plaintiff's Fourth Amendment rights when they searched that portion of 121 Millstone. 42 U.S.C. § 1983 provides no remedy without the depravation of an underlying constitutional right.[6] Therefore, the Court will grant defendants' motion for summary judgment on plaintiff's § 1983 claims for the illegal search of the basement.

b. Searching Upstairs

Next, the Court must consider plaintiff's § 1983 claims regarding the search of the upstairs apartment. In the underlying criminal case, the Magistrate Judge recommended and this Court held that plaintiff's fiancee knowingly and legally consented to the first search of the upstairs apartment. CR94-20, D.E. # 99 at 19. The second and third warrantless searches were held unconstitutional. Officer Cunigan obtained a warrant for the fourth search by affidavit, but in so doing he used information obtained from the first three searches. Because the second and third searches were unconstitutional, the Magistrate Judge purged Cunigan's affidavit of all information illegally obtained in the second and third searches and determined that the remaining information from the first search still provided probable cause to issue a search warrant for the upstairs apartment. *Id.* at 23 (*citing U.S.v. Straughter,* 950 F.2d 1223, 1231 (6th Cir. 1991).

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[6] Reed and Ford could have pursued a § 1983 action for damages against the officers for the illegal search of the basement, but any violation of Reed's and Ford's "personal Fourth Amendment rights which may have resulted from an illegal warrantless entry into [their] apartment did not inure to [Shamaeizadeh]." *U.S. v. McNeal,* 955 F.2d 1067, 1069 n.2 (6th Cir.) *cert. denied,* 505 U.S. 1223 (1992).

On appeal from the suppression order, the Sixth Circuit noted, in *dicta,* that Cunigan was only present for the third search. *See Shamaeizadeh,* 80 F.3d at 1137, n. 3. If Cunigan was only present for the third search, and the third search was constitutionally invalid, then all of Cunigan's affidavit should have been redacted. *Id.* If the entire affidavit was redacted, then it could not have supported a probable cause finding sufficient to issue a search warrant for the upstairs apartment. *Id.*

While on its face this logic is sound, it omits some important facts. Officer Wiles, who conducted the first legal search of the upstairs apartment, detected an odor of marijuana in the upstairs apartment. *Id.* at 1133. Wiles also noted that several of the interior doors of the residence, including Shamaeizadeh's room, were locked and he was unable to look inside of them. CR94-20, D.E. # 99 at 7-8. After being advised of her Constitutional rights, Schmitt told Cunigan that people in the house were growing marijuana. *Id.* at 11. Officer Wiles along with Assistant Chief Green and Sergeant Manley collectively briefed Officer Cunigan regarding their discoveries in the house *before* Cunigan conducted the third search. *Id.* at 10. Finally, Cunigan's affidavit acknowledges that he relied on information provided by the other officers, including Officer Wiles, as well as Schmitt's statement that some of the other occupants of the house were growing marijuana. *Shamaeizadeh,* 80 F.3d at 1134.

When the Magistrate concluded that the redacted affidavit provided probable cause to search the upstairs portion of the residence, he did not rely on any of Cunigan's observations from the third search. Instead, the Magistrate relied only on statements regarding the first search that Cunigan presumably received from Wiles in addition to express statements from Schmitt based upon the prevalent marijuana odor first recognized during Wiles' initial search. Of course an affidavit

on which a search warrant is issued need not reflect direct personal observations of the affiant so long as the source of information is reliable. *See, e.g., U.S.v. Ventresca,* 380 U.S. 102, 108 (1965) (credible hearsay may be the basis for issuance of a warrant); *U.S.v. Williams,* 224 F.3d 530, 532 (6th Cir. 2000) (same); *U.S.v. Leake,* 998 F.2d 1359, 1365 (6th Cir. 1993) (information received from an informant whose reliability is not established may be sufficient to create probable cause when there is some independent corroboration by the police); *Collins v. Nagle,* 892 F.2d 489, 495 (6th Cir. 1989) (probable cause is commonly based upon police observations and reliable hearsay); *U.S.v. Calandrella,* 605 F.2d 236, 246 (6th Cir. 1979) (holding that probable cause may be established from the collective knowledge of the police rather than solely from the officer who made the arrest).

Accordingly, after purging Cunigan's affidavit of illegally obtained information, there was probable cause to issue a warrant to search the upstairs portion of the residence for illegal drug activity. Because the officers had probable cause to search the upstairs and subsequently secured a valid search warrant, plaintiff suffered no constitutional violation with regard to the warrant searches. Without a constitutional violation, plaintiff has no § 1983 claim and the Court will dismiss plaintiff's claims regarding upstairs searches pursuant to warrant.

Even if the Court is incorrect as to the validity of the search warrant for the upstairs apartment, the officers are protected by qualified immunity.[7] In *Harlow v. Fitzgerald,* 457 U.S. 800

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[7] In one phrase of plaintiff's second amended complaint, he alleges claims against the defendants in their individual and official capacity. Throughout his response to defendants' motion for summary judgment, however, he only addresses the defendants in

(1982), the United States Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Concerning the "clearly established" element of the qualified immunity defense, the Court in *Anderson v. Creighton,* 483 U.S. 635 (1987) stated:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law, the unlawfulness must be apparent. (citations omitted).

483 U.S. at 640. Thus, the relevant inquiry should focus on whether an objectively reasonable official would believe that the action in question was lawful. *Yates v. City of Cleveland,* 941 F.2d 444, 447 (6th Cir. 1991). "Under this test, an official will be immune 'if officers of reasonable competence could disagree' on whether the conduct violated the plaintiff's rights." *Gossman v. Allen,* 950 F.2d 338, 341 (6th Cir. 1991)

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their individual capacity. In addition, plaintiff tackles defendants' qualified immunity arguments on the merits without once alleging that the defendants, in their official capacity, are not eligible for a qualified immunity defense. Based on a fair reading of the response, the Court is left to assume that plaintiff is not pursuing claims against the defendants in their official capacity where he doesn't argue that to defeat dismissal. Furthermore, the Court only relies on qualified immunity as alternative support for an otherwise illegitimate constitutional claim.

(citations omitted); *Johnson v. Laccheo,* 935 F.2d 109 (6th Cir. 1991). The question of whether an official is protected by qualified immunity does not turn on the subjective good faith of the official, but instead on the objective legal reasonableness of the official's actions, assessed in light of the legal rules that were clearly established at the time the official took the action in question. *O'Brien v. City of Grand Rapids,* 23 F.3d 990, 998-999 (6th Cir. 1994).

Based upon the facts in the record, and the law established at the time plaintiff's home was searched, the officers did not violate "clearly established" constitutional rights. Not only could competent officers acting in the field under the pressures of an investigation reasonably disagree on whether the conduct violated plaintiff's rights, but jurists, with time to reflect on the issues, could reach different but reasonable conclusions. Therefore, the officers are protected by qualified immunity as to the searches under warrant performed in the upstairs apartment.

The second and third search of the upstairs apartment were of no consequence and at best constitute harmless error. The Court purged the affidavit justifying the subsequent warrant searches of all information gathered from the second and third search - the warrant was based on information gathered during the ftrst search alone. The seizure of plaintiff's personal belongings, the arrest, or the prosecution did not stem from the second and third search of the upstairs. Furthermore, plaintiff alleged no injury from these two searches of the upstairs apartment.

The basic purpose of § 1983 damages is "*to compensate persons for injuries* that are caused by the deprivation of constitutional rights." *Carey v. Piphus,* 435 U.S. 247, 254 (1978) (emphasis added). Constitutional violations standing

alone do not warrant recovery. Plaintiff can recover § 1983 damages only if he proved actual injury caused by the denial of his constitutional rights. *Id.* at 264. "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries. . . ." *Id.* at 254. "Where no injury was present, no "compensatory" damages [can] be awarded." *Memphis Community School Dist. v. Stachura,* 477 U.S. 299, 308 (1986) (quoting and discussing the *Carey* decision as noted above).

The Court will dismiss all of plaintiff's § 1983 claims alleging constitutionally deficient searches of the basement and upstairs apartments.

c. Seizures

Plaintiff contends that the officers violated his constitutional rights by exceeding the scope of the warrant and seizing various documents and jewelry. The search warrant originally issued by the Madison County Judge permitted a search for the following items: "Any and all illegally possessed controlled substances including marijuana, both growing and processed, and any drug paraphernalia, also any and all illegally possessed prescription drugs." CR94-20, D.E. # 99 at 13. In response, defendants claim that items seized were in plain view and incriminating.

To justify the application of the "plain view doctrine," the officer seizing the contraband must show that the evidence: (1) was in plain view; (2) was viewed by an officer lawfully located in a place from where the object can be seen; and (3) was of a character that was immediately incriminating. See *U.S.v. Roark,* 36 F.3d 14, 18 (6th Cir. 1994) (*citingHorton v.* California, 496 U.S. 128 (1990). Defendants easily satisfy the

first two elements of this test. As the United States Supreme Court repeatedly has recognized:

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.[8] Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. . . . When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers. . . must give way to the interest in the prompt and efficient completion of the task at hand.

United States v. Ross, 456 U.S. 798, 820, 21 (1982) (footnote quoted from original text). Because the items listed in the warrant could have been discovered virtually anywhere, the officers were permitted to search any of the locations where they may have encountered the paperwork or jewelry. They were legally in a position to plainly view the items seized.

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[8] In describing the permissible scope of a search of a home pursuant to a warrant, Professor LaFave notes: "Places within the described premises are not excluded merely because some additional act of entry or opening may be required. 'In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and similar items has been permitted.'" 2 W. LaFave; *Search and Seizure* 152 (1978) (quoting *Massey v. Commonwealth,* 305 S.W.2d 755, 756 (Ky.1957)).

Next the Court must determine whether the evidence was of a character that was immediately incriminating. A plain view seizure is "presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Texas v. Brown,* 460 U.S. 730, 742 (1983) (citations omitted). In this case, the officers seized jewelry that they discovered in the upstairs apartment. The officers contend that jewelry is often the fruit of a drug related crime and they believed that it was tied to the impending drug charges. The Court finds that, given the subject matter of the search warrant, there was probable cause to associate the jewelry with selling drugs. At the very least, the officers were objectively reasonable in confiscating the jewelry and their actions are protected by qualified immunity.

The officers also seized various documents from the upstairs apartment including social security cards and tax and insurance documents. These documents detailed what the officers presumed to be multiple identities for the plaintiff. The various documents contained two social security numbers and different but similar sir names for the plaintiff. The documents clearly provided the officers with probable cause to believe that plaintiff had false or multiple federal identifications and had forged federal and/or state documents. The officers were justified in seizing these documents or were again objectively reasonable in believing that these contradictory documents gave rise to probable cause of criminal activity.

Accordingly, the Court will grant defendants' motion for summary judgment on plaintiff's § 1983 claims for the illegal seizure of plaintiff's jewelry and documents.

d. Arrest

Plaintiff also contends that he was falsely arrested for various drug charges including conspiracy to manufacture and produce marijuana, maintenance of a place for the purpose of manufacturing marijuana, and using his residence to facilitate violations of the federal drug laws. The officers had probable cause to arrest the plaintiff after discovering nearly 400 marijuana plants in the basement apartment of his home. The door between the two apartments was forced open and the plaintiff's fiancee told the officers that the marijuana smell from the basement was often so strong that she covered her vents.

> The Supreme Court has held that the test for whether an arrest is constitutionally valid is "whether, at the moment the arrest was made, the officers had probable cause to make it--whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

United States v. Dotson, 49 F.3d 227, 229 (6th Cir.), *cert. denied,* 516 U.S. 848 (1995)(quoting *Beck v. Ohio,* 379 U.S. 89, 91 (1964)). To be sure, the marijuana was suppressed as to Ford and Reed, but this Court determined that plaintiff did not have standing to challenge the validity of the basement search. Based on these facts and the standard for arrest, the officers had probable cause to believe that plaintiff was involved, conspired, or aided and abetted in the cultivation and sale of marijuana. If not, then the officers are protected by qualified immunity because their actions were objectively reasonable.

Therefore, plaintiff did not suffer a constitutional violation and the Court will dismiss his § 1983 claims for false arrest.

2. § 1983 Misrepresentation Claim

Reading the complaint and the more particular statement of the complaint in a light most favorable to the plaintiff, he alleges that Joel Cunigan "drafted the incomplete Affidavit by failing to inform the Magistrate of the existence of two residences at 121 Millstone Drive and. . . misrepresented the order of the search and the order of the things found." [D.E. # 34] Cunigan did in fact fail to inform the Madison County Judge that this home consisted of two separate apartments. Plaintiff contends that the "persons" searched based upon this affidavit were the persons harmed by Cunigan's exclusion. Indeed, Ford's and Reed's apartment was illegally searched at least in part because Cunigan did not inform the issuing Judge that the home was divided into two apartments. However, that omission did not affect the validity of the search warrant as to the upstairs apartment. Plaintiff was denied standing to challenge the validity of the search and cannot vicariously assert his neighbor's constitutional rights under § 1983.

Plaintiff also alleges that John Telek "misrepresented in an Affidavit that the warrant was for the seizure of property, when the property had already been illegally seized." *Id.* In support of their motion for summary judgment defendants offer Officer Telek's deposition in which he expressly stated he did not swear to an affidavit for a second search warrant only to cover items already seized during the execution of the first warrant. The second warrant authorized a search and seizure of, *inter alia*, tax records or documents reflecting the income and/or sources of income for plaintiff and any documents reflecting the purchase of drug paraphernalia. Of note, the second warrant

did not mention any false identification evidence or insurance records.

In addition, it is undisputed that the return on the first warrant, including the various documents seized in plain view, was recorded on the face of the first warrant upon execution. Defendants concede that all of the documents listed in the return were obtained during the first search. This was not a situation where there was a pile of undocumented evidence and Telek had an opportunity to tidy up an otherwise excessive search. There was no opportunity to cover for an allegedly bad search; as plaintiff noted, even all of the taxes records were taken and recorded after the first search. In fact, the documents initially seized prompted Telek to return with a second warrant to explore financial documents that may not have been immediately incriminating.

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the homering party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore,* 8 F.3d at 340. Conclusive allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. Nonetheless, plaintiff does not offer one scintilla of evidence to support his case. He does not contest the sequence in which the documents were discovered or the order in which the affidavits were sworn to the judge. He offers no alternative set of facts but instead relies on the fact that the items seized after the first search wore similar to some of those listed in the second affidavit. Based on these bald assertions, a reasonable jury could not find for the plaintiff. Accordingly, his § 1983 misrepresentation claim against Telek must fail.

3. State Law Malicious Prosecution Claim

Finally, the Court granted the parties' joint motion to extend supplemental jurisdiction over plaintiff's state law malicious prosecution claim. The elements of malicious prosecution in Kentucky are:

> (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

McMaster v. Cabinet for Human Resources, 824 F.2d 518, 520- 21 (6th Cir. 1987) (quoting *Raine v. Drasin,* 621 S.W.2d 895, 899 (Ky.1981)). "Because the tort of malicious prosecution was disfavored at common law, the prerequisites for maintaining the action are 'strict.'" *Id.*

As noted above in section II. B. 1. d., *supra,* the officers had probable cause to believe that plaintiff was involved, conspired, or aided and abetted in the cultivation and sale of marijuana and used his home in the process. Therefore, the prosecutors had probable cause to prosecute Shamaeizadeh for those same charges. Furthermore, a federal grand jury found probable cause to proceed with the case as well. Because the defendants had probable cause to prosecute plaintiff, plaintiff cannot establish a *prima facie* case for malicious prosecution. His final state law tort claim must fail and the Court will dismiss the same.

III. CONCLUSION

The Court, being otherwise fully and sufficiently advised, **HEREBY ORDERS** that:

(1) defendants' motion for summary judgment [D.E.# 42] is **GRANTED**;

(2) defendants' motion in limine [D.E. # 55] is **DENIED AS MOOT**; and

(3) judgment in favor of defendants will be entered contemporaneously with this opinion and order.

This 19th day of September, 2001.

/s/_____
KARL S. FORESTER, CHIEF JUDGE

No. 03-1030

Supreme Court, U.S.
FILED
APR 14 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOEL CUNIGAN, MARK WILES, ASST. CHIEF WAYNE GREEN, SAM MANLEY, JOHN TELEK,

Petitioners,

v.

ALI SHAMAEIZADEH, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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COUNTERSTATEMENT OF THE CASE

The Petitioners' statement of the case is an accurate reprinting of the Sixth Circuit's rendition of the published facts. However, there are two points left out of the facts that Respondent needs to add. There are also facts alleged in the argument that are disputed.

1. The first officer on the scene, Mark Wiles, admitted that despite his claim that he recognized the smell of growing marijuana, he had never, prior to that moment when he entered the home at Millstone Drive, ever been exposed to nor sensed the smell of growing marijuana.

2. It is important to note that the United States did not choose to appeal the suppression of the items seized from Dr. Shamaeizadeh.

3. Respondent contests the statements of Petitioners that the items illegally seized were returned before the case was dismissed against him.

4. Respondent contests any assertion that Teresa Schmitt did anything other than ask the police to search the Millstone residence for a burglar.

REASONS FOR DENYING CERTIORARI

INTRODUCTION

The Petitioners file their second petition for certiorari before this Court asking this Court to reverse the Sixth Circuit for alleged errors committed on five separate subjects; two concerning consents to search, one related to

qualified immunity, one related to limitations of actions and one related to seizure of items alleged to be in plain view.

The Petitioners are asking this Court to extend Fourth Amendment consent analysis as it relates to the exigencies of automobiles to consent given to search houses, where the exigencies of mobility do not apply, or find them entitled to qualified immunity for believing they get to rely on search rules that apply to cars not homes.

Further, the Petitioners wish the Court to review a limitations argument despite the fact that the Court previously chose not to review the argument, thus making this issue decided as law of the case and final.

Lastly, the Petitioners ask the Court to declare the time it takes to find and compare two documents side by side for dissimilarities as being a period of time that is "immediate" such that they can claim a "plain view" exception to the seizure of items.

For the following reasons, none of these arguments merit the attention of this Court.

I. PETITIONERS SEEK TO EXTEND TO HOMES THE CONSENT EXCEPTIONS THAT APPLY TO AUTOMOBILES

The Petitioners have crafted an argument that says since the Fourth Amendment protections have been eroded as to automobiles, that now these exceptions should be applied to consent searches of homes.

They cite to *Florida v. Bostick*, 501 U.S. 429 (1991) and *United States v. Drayton*, 536 U.S. 194 (2002) claiming

these cases are authority for the assertions that in all matters under the Fourth Amendment, *per se* rules are inappropriate and that concerning all consent searches that we should look to the totality of the circumstances to determine if consent was given.

The Petitioners claim the Sixth Circuit ruling has created a "*per se*" rule

> . . . that requires officers to obtain additional consent for subsequent searches that are close in time and purpose and to request express consent in every circumstance to verify that implied consent exists or continues.

Respondent argues that there is nothing in the Sixth Circuit opinion that creates any rule concerning the scope of a search. The Sixth Circuit has merely stated that when officer Wiles was invited to a home to protect a woman from a burglar, he should have asked for consent to search the property of the home's occupants for criminal activity. The Sixth Circuit looked at all the facts and then applied the well-established law that says "[w]hen an official search is properly authorized – whether by consent or by the issuance of a valid warrant – the scope of the search is limited by the terms of its authorization". *Walter v. United States*, 447 U.S. 649, 656 (1980).

The Petitioners wish to expand a request for help by a lone woman in a house into consent to invite others in, who then search the property of the inhabitants without saying why or asking permission. And they claim for the Court to do otherwise is an unreasonable burdening and inhibiting of law enforcement, even though the United States attorney did not choose to appeal this ruling in the criminal prosecution phase of this case.

The Respondent would phrase the issue, should we allow burglary victims to be searched at the whim of the police, who had come to help them, without any Fourth Amendment protections remaining? In other words, when you call the police for help, are you abandoning your Fourth Amendment rights?

The Petitioners' assertion with which Respondent most disagrees is one that Petitioners claim without citation to authority. They state on page ten (10) of their petition,

> Particularity is always required for the issuance of a valid search warrant, but searches by consent are an exception to the Fourth Amendment, and need not be expressed or given "with particularity" to be valid.

A. THE SCOPE OF THE INITIAL SEARCH WAS LIMITED

The Petitioners assume in their arguments that they had, at the time of the first search, blanket permission to search the Millstone residence for all purposes, including criminal activity of the residents, and that said permission continued as each new officer arrived and each new warrantless search was conducted. Respondent believes there is only evidence that supports the assertion that the police were asked to secure Ms. Schmitt from a burglar. No other consent to search was given. Therefore, the initial assumption of the Petitioners' argument concerning continued consent is false and therefore, logically, their argument must fail.

Based on this faulty assumption, the Petitioners argue that they had the right to call in backup to search

the house, claiming, "[i]t is undisputed that Schmitt called the police and invited the police to enter the residence and perform a *thorough* search". Petition at p. 11 (emphasis added)

There is not one shred of evidence that Schmitt did more than ask the police to save her from a perceived burglar. The record will not support the claim of the Petitioners. To take this case only to find out the facts are not as represented will be a waste of the Court's time.

The Petitioners cite to a litany of cases concerning consent to search continuing through subsequent searches. Respondent's problem with this line of authority is that none deals with a set of facts where the scope of the search changes from public safety to criminal investigation.

These cases start out with the premise that the first search was for criminal behavior and that the subsequent searches were a continuation of that search. In this case, no consent was given in the context of the officer searching the house for Respondent's or a resident's criminal behavior. When the police changed from friend to foe, they had the obligation to request consent for searches of the home for criminal activity of the residents. The law is clear on this. The Sixth Circuit is correct on this issue.

II. IMPLIED CONSENT

The Petitioners argue that the Sixth Circuit opinion also ignores the idea that Schmitt gave consent to search for drugs, not by words, but implied through her actions. Implied consent is the concept of actions substituting for words. Petitioners argue Schmitt's actions were consistent with consent to continue searching. The problem with

their argument is not with Schmitt giving continued assistance. She did. But her assistance was in searching for a burglar to make her residence safe, not in searching for drugs. No logical inference can be drawn from a woman requesting assistance from a possible burglary, then helping the police look for a burglar, as consent for the police to now search her house for drugs without some mention of drugs before the search began. There was no consent to search for drugs. The opinion was proper.

III. QUALIFIED IMMUNITY

As an extension of Petitioners' argument concerning consent, they argue there was no case which put the officers on notice that for an officer to have consent to search a house for drugs after he had been called there for help requires the officer to ask for this consent. The Sixth Circuit cited to *Walter v. United States*, supra, which states specifically that the scope of the search pursuant to consent is limited by the terms of its authorization. *Id.* at 656. *Walter* was issued in 1980. Therefore, all elements are satisfied to deny qualified immunity to the Petitioners.

IV. LIMITATIONS

The Petitioners' argument on limitations is conditioned on a premised fact that is not true. For the Petitioners argument to even begin to have merit we have to assume that some of the items seized were returned to Respondent before the criminal case was dismissed. Respondent believes when the police check their logs they will see the seized items were not returned until after the indictment was dismissed.

Since this fact is not true, there are no facts upon which to make the argument that seized items returned by police prior to dismissal of criminal charges should trigger the running of limitations from some point prior to dismissal but only as to those items returned prior to dismissal.

Heck v. Humphrey, 512 U.S. 477 (1994) is being applied relatively uniformly throughout the circuits and with common sense. There is no real split in the circuits on this issue as Respondent said in his prior brief in opposition filed October 28, 1999 No. 99-562.

Lastly, since the limitations issue was raised in a previous appeal and this Court chose not to take it, it is law of the case, final, and cannot be litigated again.

V. PLAIN VIEW

The Petitioners also ask this Court to eviscerate the plain view doctrine by asking the Court to hold that the finding of two paper documents among many and then the act of comparing the writing on each, are acts that are of such short duration that it satisfies the immediately incriminating requirement of the plain view exception to the particularity requirement for seizure pursuant to warrant.

Even if the Court did rule for the Petitioners on this issue, it would provide them little relief; as there are other items illegally seized that remain held illegally seized and are not within the scope of this petition.

Lastly, there is simply no conceivable way for the time it takes to compare writing on documents to be termed immediate. The acts of studying two documents, of looking

left at one, then looking right at another, and so on until satisfied of their criminality, is not immediate in any sense of the word. There can be no plain view exception that applies to these facts. The police took items that were outside the scope of the warrant. This violates the particularity requirement and violated claimant's rights.

CONCLUSION

WHEREFORE, Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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In the Supreme Court of the United States

JOEL CUNIGAN, MARK WILES, ASST. CHIEF
WAYNE GRANT, SAM MANLEY, JOHN TELEK,
Petitioners,

v.

ALI SHAMAEIZADEH, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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I. THE SIXTH CIRCUIT REJECTED THE RULINGS OF OTHER COURTS AND REQUIRED CONSENT TO BE EXPRESSED AND PARTICULARIZED.

The Sixth Circuit's rule for consent searches created in this case rejects the totality of the circumstances approach and is in conflict with rulings of this Court and other sister circuits. The Court below held that police officers are required to obtain express consent upon a search, creating a rule that ignores the totality of the circumstances in order to determine consent.

The facts of this case have been well developed through the four published opinions of the Court below. There is no disputed material fact that Respondent's live-in girlfriend escorted the officers in their walk-throughs of the house. (Appndx, at 7a). Respondent even acknowledges so in his brief ("[t]he problem with their argument is not with Schmitt giving continued assistance. She did"). Respondent's Brief in opposition to Certiorari, at p. 5-6. The issues of continuing and implied consent are therefore critical to this action as the officers relied upon Schmitt's actions in their continued presence. This case certainly then, contrary to Respondent's assertion, is not a waste of this Court's time.

As cited in Petitioner's prior brief, the Supreme Court of Alaska stated in Phillips v. State, 625 P.2d 816 (Alaska 1980), "there is relatively little authority on this question but what authority there is supports our view [on continuing consent]." Id., 625 P.2d at 818. In the last nearly 25 years, what legal authority exists reveals a continuing consent doctrine that places the burden on the individual to object or revoke consent once given. As discussed below, this approach is consistent with judging consent by the totality of the circumstances and allowing for implied consent.

Respondent boldly claims "there is nothing in the Sixth Circuit opinion that creates any [per se] rule concerning the scope of a search." However, on Appdx. page 18a, the Sixth Circuit applies the same "particularity requirement" required of search warrants to the scope of a consensual search and relies upon Walter v. U.S., 447 U.S. 649, 656 (1980) for this proposition. Walter does not stand for such a proposition and, in fact, is not even a consent case. More importantly, Walter states a non-controversial proposition that the scope of a search - whether by consent or by the issuance of a valid search warrant - is limited by the terms of its authorization. Walter, 447 U.S. at 656 (Appdx. at 18a). But, the Court below went further and erroneously stretched the meaning of this language from Walter holding that "the Fourth Amendment 'requires that the scope of every authorized search be ***particularly described***.'" (Appndx. at 18a). The Sixth Circuit, therefore, has expressly created a rule that consent to a search must be "particularly described," just as a search warrant must be described.

The Sixth Circuit further reasoned that Petitioners "do not assert that Schmitt ***explicitly consented*** to the second or third search. In fact, they admit that they did not ***expressly request her consent*** when additional officers arrived to search the residence and that they do not recall Schmitt ***expressly articulating any such consent*** of her own volition." (Appndx. at 20a). The Sixth Circuit thus has now established what is in effect a *per se* rule that requires officers to obtain additional consent for subsequent searches that are close in time and purpose and *to request express consent* in every circumstance to verify that implied consent exists or continues.

This approach rejects well-established law from this Court and other circuits that implied consent may be granted and is to be judged by the totality of the circumstances. Florida v.

Bostick, 501 U.S. 429, 439 (1991); United States v. Drayton, 536 U.S. 194, 201 (2002); United States v. Hylton, 349 F.3d 781 (4th Cir. 2003); United States v. Barahona, 990 F.2d 412, 418 (8th Cir. 1993); United States v. Griffin, 530 F.2d 739, 742 (7th Cir. 1976); United States v. Chaidez, 996 F.2d 377, 382 (8th Cir. 1990)(cooperation evidences voluntary consent); U.S. v. Sanchez-Valderuten, 11 F.3d 985, 991 (10th Cir. 1993)(defendant's conduct while search taking place indicates he freely consented to the search). Of course, these cases also make clear that consent can be demonstrated not just by words but also by conduct. Accordingly, the Sixth Circuit's rule that consent be "expressed" and "articulated with particularity" conflicts with all other established law.

The concept of "particularity" with regard to a search warrant means that the scope, place and extent of the search must be "expressly articulated" and written down on the face of the warrant, or otherwise the search is invalid. Blanket consent as an exception to the search warrant requirement is not, however, inappropriate at all. As Drayton, supra, demonstrates, law enforcement officers often face circumstances where no express consent will be particularized. When, in response to a request for consent to search, one subject said "go ahead" and lifted his bag, while the other said nothing but lifted his hands, the consent for the latter was not "expressly particularized" (and thus unlawful according to the Sixth Circuit) but yet held lawful by this Court. Drayton, 536 U.S. at 198-200. Both were deemed consensual searches when viewed under the "totality of the circumstances" test. Id., at 201. Their consent was anything but expressly articulated with particularity. Indeed, it was, in effect, blanket consent to search their belongings.

The fact that much of the relevant case law cited relates to searches of automobiles or of the persons rather than of a dwelling is inconclusive. Consent for purposes of the

reasonableness requirements of the Fourth Amendment is not dependent upon the item to be searched or seized; much as the requirements of probable cause for search or the particularity requirements for a search warrant do not differ based upon the item to be searched or seized.

This decision by the Sixth Circuit will have devastating effects upon law enforcement. The Court's ruling will prohibit police from the normal practice of having back-up assistance. This Court has never required that each officer entering the scene must independently have sufficient cause to act. Moreover, no clearly established law requires each individual officer to obtain separate consent to search so long as the consent is deemed continuing. Under such circumstances, back-up officers arriving for the safety of all concerned will be prohibited from assisting fellow officers, unless an exigency exists. Such is the effect of the Sixth Circuit's ruling.

Moreover, this new rule of the Sixth Circuit will create havoc for law enforcement throughout Kentucky, Michigan, Ohio and Tennessee and effectively end search by consent. The crippling effect upon the major metropolitan police forces in Detroit, Nashville, Cincinnati, Louisville and Memphis of this rule is untenable. For example, a yearly study by the Michigan State Police for 2000 indicates that its State Troopers conducted 564,672 traffic stops that year. Of that number, 27,800 resulted in searches of the automobile. Twenty-nine percent, 8,122, of those searches were based upon consent. See "Michigan State Police - 2000 Traffic Enforcement Summary" *http://www.michigan.gov/msp/0,1607,7-123-1645_3501_4627-11838–,00.html*. According to the Sixth Circuit, those consent searches will only be valid if the driver gave express particularized consent.

II. THE DELAYED ACCRUAL RULE OF HECK V. HUMPHREY DOES NOT APPLY TO RESPONDENT'S CLAIM OF ILLEGAL SEIZURE.

There is no material dispute in this case that jewelry and personal papers were seized from Respondent's home. However, it is likewise undisputed that those items were returned to him well before the dismissal of the criminal charges. (Plaintiff's Depo., at p.115). The jewelry was returned "a couple of months" after they were seized (Plaintiff's Depo., at p. 115), i.e., the later months of 1994. As for the papers seized, these items consisted of social security cards, each with different social security numbers. Plaintiff also claims bank account and brokerage account papers were seized as well. Plaintiff claims these documents were returned to him"at least between nine months to a year" (Plaintiff's Depo., at p.116) after they were seized, i.e., mid-1995. The criminal charges were dismissed on April 9, 1996, and the Complaint in this matter was filed April 8, 1997, well after one year from the return of the items and thus beyond the statute of limitations.

The Sixth Circuit below held that the plain view doctrine did not apply to seizure of these items because there was no immediately incriminating nature. Yet, the Court held Respondent's claims were not barred by the applicable statute of limitations because "it would have been impossible to conclude during the course of Shamaeizadeh's criminal proceeding that the seized jewelry and papers would not have been used as evidence of the alleged illegality." App., *infra*, 35a, fn.6.

In Wilson v. Garcia, 471 U.S. 261 (1985), this Court accepted certiorari to determine the applicable statute of limitations in Section 1983 actions. Reasons supporting review were well founded as "[f]ew areas of the law stand in greater

need of firmly defined, easily applied rules than does the subject of periods of limitations." Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (REHNQUIST, J., dissenting). "Thus, the conflict, confusion, and uncertainty concerning the appropriate statute of limitations to apply to this most important, and ubiquitous, civil rights statute provided compelling reasons for granting certiorari." Wilson, 471 U.S. at 266.

Like calculating limitations periods, accrual of causes of action deserve just as much "firmly defined, easily applied rules." The Court below applied a delayed accrual rule for a cause of action relating to an illegal search and seizure, thus broadening the rule's scope for any act of the police in the execution of the search, even those unrelated to any criminal proceeding based upon the Court's "impossibility" standard. This ruling is in great conflict among the circuits.

This Court held in Heck v. Humphrey, 512 U.S. 477, 487 (1994) (italics in original), that "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." In footnoting this point, this Court wrote that:

> [f]or example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery,...and especially harmless error,...such a §1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful.

Id. 512 U.S. at 487 n.7 (citations omitted).

As the Court below previously observed, this Heck footnote has been "interpreted in two different ways." Shamaeizadeh v. Cunigan, 182 F.3d 391, 395 (1999). The Sixth Circuit reads it as "clearly rejecting the conclusion that a general exception to the requirement that a conviction be set aside exists for Fourth Amendment claims under §1983." Id., at 396, citing Schilling v. White, 58 F.3d 1081 (6th Cir. 1995). Now, the Sixth Circuit extends its minority rule to a claim of unlawful seizure, even though the items seized were returned before the criminal charges were dismissed and were unrelated to the underlying criminal charges. App., *infra*, 35a, fn 6.

In Harvey v. Waldron, 210 F.3d 1008 (9th Cir. 2000), the Ninth Circuit joined the Sixth Circuit's reasoning. The Harvey Court noted that this Court never addressed the applicability of Heck to §1983 claims alleging damages attributable to an allegedly illegal search and seizure of property and that "**[t]here is a split in the circuits as to how Heck's footnote seven should be interpreted.**" Harvey, 210 F.3d at 1015 (emphasis added). In Harvey, old gambling machines were seized and the subject was charged with possession of those items which was prohibited at the time. Id., at 1010. The Ninth Circuit joined the Second, Fifth and Sixth Circuits finding that a cause of action for unlawful search and seizure does not accrue until the criminal charges are dismissed. Id., at 1015 ("a §1983 action alleging search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction overturned").

The Second Circuit has adopted a similar approach. See Covington v. City of New York, 171 F.3d 117 (2d Cir. 1999). In Covington, the plaintiff brought a §1983 claim alleging an unconstitutional false arrest after criminal charges were dismissed against him. Id. at 119. The Second Circuit held

that the determining factor as to when Covington's cause of action accrued depended upon whether "a judgment in Covington's favor on the false arrest claim would have undermined the validity of any potential conviction in the criminal proceedings against him." Id. If so, the cause of action would not accrue until after termination of the criminal proceedings.

The Fifth Circuit Court of Appeals follows a similar approach. See Mackey v. Dickson, 47 F.3d 744 (5th Cir. 1995). In Mackey, the plaintiff brought an unreasonable search and seizure claim which the district court treated as an attack on his arrest. Id. at 745-46. The Court held "...if he is convicted and evidence is presented...which is a...product of...his arrests, then his §1983 damage claims challenging the validity of his arrests would appear to undermine the validity of his conviction" and hence be barred by Heck. Id. at 746.

On the other hand, four other circuit courts of appeals (the Seventh, Eighth, Tenth and Eleventh) hold that Heck's footnote 7 creates a general exception to Heck for a §1983 Fourth Amendment unreasonable search and seizure claim. See, e.g., Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998) (stating "Fourth Amendment claims for unlawful searches or arrests do not necessarily imply a conviction is invalid, so *in all cases* these claims can go forward") (italics added).

The Seventh Circuit interprets Heck in a brightline "general exception" fashion, holding that in *all* Fourth Amendment claims of unlawful search or arrest, Heck has no application. See, e.g., Copus, 151 F.3d at 648; Gonzalez v. Entress, 133 F.3d 551, 553-54 (7th Cir. 1998); Perez v. Sifel, 57 F.3d 503 (7th Cir. 1995) (holding "claims relating to an illegal search and improper arrest may not be [Heck-]barred, as neither claim would necessarily undermine the validity of the conviction").

In Gonzalez, supra, suit was not commenced until well beyond the expiration of limitations calculated from the date of the search and arrest. Judge Easterbrook thoroughly explains the Seventh Circuit's approach to Fourth Amendment claims, expressly recognizing the conflict with the Sixth Circuit, but nevertheless continuing to interpret Heck's footnote 7 to mean "a claim based on an unlawful search or arrest may be brought immediately[] because a violation of the fourth amendment does not necessarily impugn the validity of a conviction." Gonzalez, 133 F.3d at 553. In holding Gonzalez's claim time-barred, the Court stated "a claim asserting a violation of the fourth amendment necessarily 'accrues' at the time of the unlawful search or seizure, as we have held several times." Id. The Court reasoned "that a search can be unlawful but the conviction entirely proper, or the reverse, and that *some injury* from a violation of the fourth amendment is unrelated to the conviction." Id. at 554 (italics added).

The Eighth Circuit Court of Appeals aligned with the Seventh Circuit (Simmons v. O'Brien, 77 F.3d 1093 (8th Cir. 1996). The Simmons Court held that the Fifth Amendment claims accrued at the time of the alleged violations, and that accrual of claims was not dependent upon the favorable outcome of criminal charges. Applying Heck's footnote 7, the Court stated: "harmless error analysis is applicable to the admission at trial of coerced confessions, [and therefore] judgment in favor of Simmons on this §1983 action challenging his confession will not necessarily demonstrate the invalidity of his conviction." Id. at 1095.

The Tenth and Eleventh Circuits have followed suit. See, e.g., Crow v. Penry, 102 F.3d 1086 (10th Cir. 1996) (dismissing a federal inmate's claim that his probation officer unlawfully obtained search and arrest warrants); Datz v. Kilgore, 51 F.3d 252, 253, n.1 (11th Cir. 1995) (holding that Heck did not bar a section 1983 unlawful search claim because

the conviction might still be valid because of such doctrines as inevitable discovery, independent source and harmless error).

Footnote 7 of the Heck case has been interpreted inconsistently between various circuit courts of appeals. There exists a clear-cut, direct conflict between the Second, Fifth, Sixth and Ninth Circuits with the Seventh, Eighth, Tenth and Eleventh Circuits in their respective approaches and holdings regarding accrual of §1983 claims. In fact, most of these courts recognize their split. The differences in opinions have existed since just after Heck was handed down. Courts addressing this issue for the first time line up on one side or the other of the conflict.

CONCLUSION

This case presents two critical issues of importance: the implied/continuing consent doctrine and the accrual of causes of action under Heck. Both areas represent recognized splits in the Circuits and the facts are very well developed in the multiple opinions below with no dispute of material fact. The issues are of extremely high importance given the number of consent-based searches, the non-uniform application of the Heck rule, and the growing split among the Circuits. Just as was warranted in Wilson v. Garcia, for the sake of uniformity, certainty and predictability in the law, especially as the law pertains to the proper calculation of claim accrual and limitations, this Court should intercede and resolve this conflict.

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